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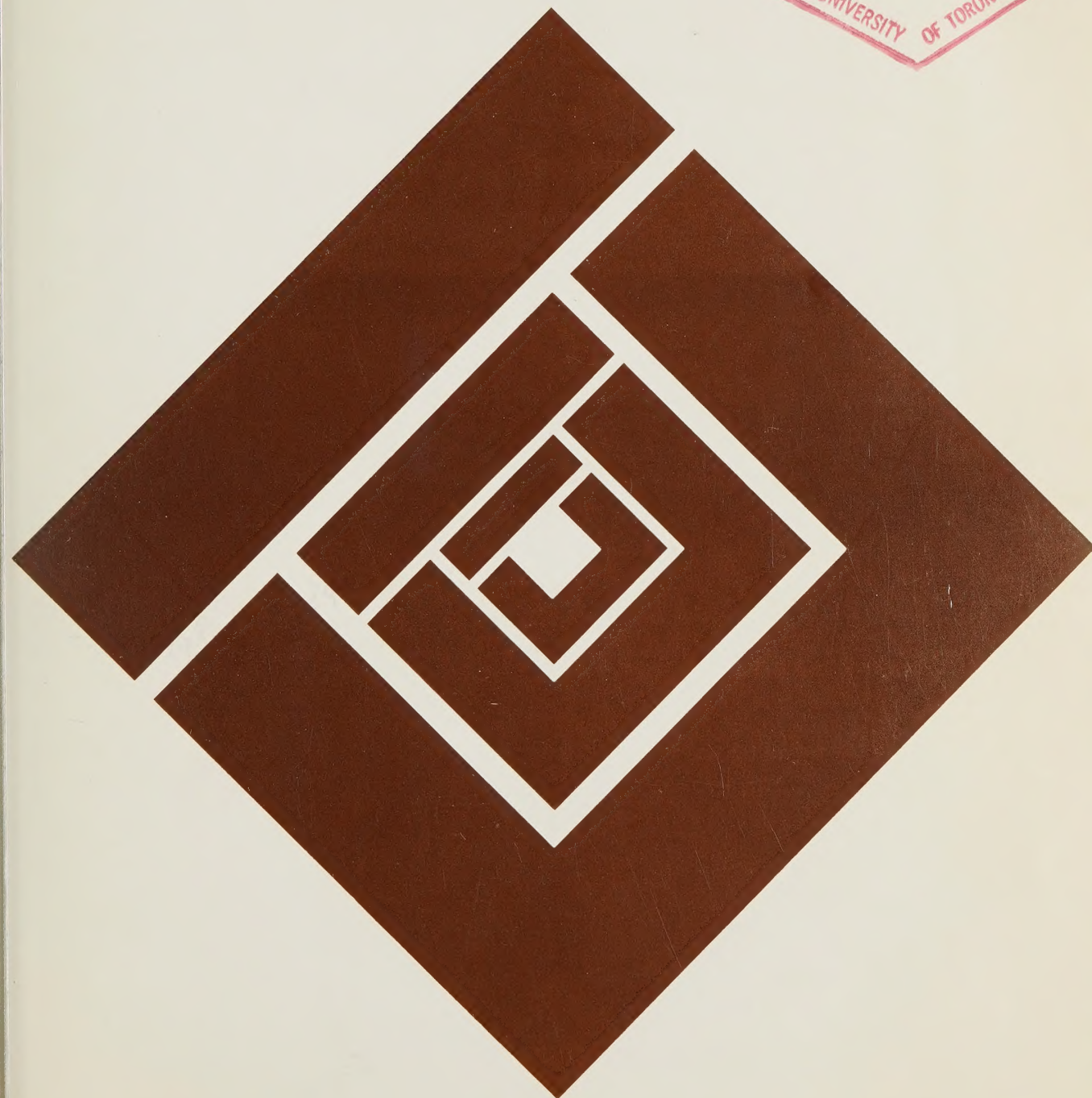


Ontario
Labour Relations
Board

Decisions

November 82

CA20N
LR
- 454



ONTARIO LABOUR RELATIONS BOARD

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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1982] OLRB REP. NOVEMBER

Selected decisions of particular reference value are
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Reports*, Butterworth & Co., Toronto.





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Voluntary Recognition – Reconsideration – Termination – Application seeking reconsideration of dismissal decision or direction of vote – Test in section 60 whether union had majority support at time recognition agreement entered into – Board not having power to direct vote where union had such majority support – Section 60 not providing for termination where support existed at time of recognition agreement

SIGAL SHIRT COMPANY LIMITED; RE ANGELA LOPARDO; INTERNATIONAL LADIES’ GARMENT WORKERS’ UNION 1720

1311-82-M Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Candesco (1978) Ltd.**, Respondent

Construction Industry Grievance – Practice and Procedure – No dispute as to rights under collective agreement – Employer alleging promissory estoppel precluding union from relying on agreement – Estoppel not established

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members H. Kobryn and C. G. Bourne.

APPEARANCES: *B.W. Adams, M. Whelen and J. Campbell for the applicant; R.A. Werry and Ted Burrows for the respondent.*

DECISION OF THE BOARD; November 8, 1982

1. This is a grievance filed under section 124 of the Act in which it is claimed that members of the bargaining unit who worked the third or midnight shift for the respondent employer for a period from August 25, 1982 to September 10, 1982 were not paid shift premium in accord with the collective agreement.

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3. There is no dispute between the parties with respect to the proper interpretation of the relevant section of the collective agreement. The company does not dispute that the union's claim is based on a correct reading of the agreement. The company maintains, however, that the union is estopped from relying on its contractual rights by virtue of representations which it made to the company and upon which the company relied, to its detriment, in deciding to implement a night shift.

4. The Board heard evidence with respect to these alleged representations. The evidence establishes that the company considered instituting a night shift at its Elm Street site in late August. Mr. Alf Pellay, the company's site co-ordinator, asked Mr. Ed Solomon, the supervisor at the Elm Street site, on Friday August 29th, to make inquiries of the union with respect to the rate of pay for a night shift. Mr. Joe Campbell, the union's business representative, arrived at the site in the morning of Monday, August 23rd. During the course of a tour of the site, Mr. Solomon asked him if the company needed the union's permission to institute a night shift and was told that it didn't so long as it paid the correct rate. Mr. Solomon said that he understood the rate was seven hours' work for eight hours' pay to which Mr. Campbell replied in the affirmative. Mr. Solomon testified that he made it clear that he was asking about a midnight shift rate. Mr. Campbell testified that there was no mention of a starting time and that he assumed, because it is so unusual to work a midnight shift in the industry, that Mr. Solomon was referring to an afternoon shift. The rate for the afternoon shift is time and one seventh or seven hours' work for eight hours' pay. The rate for the midnight or third shift is time and one half. Mr. Solomon testified that if he knew that the rate was time and one half the company would not have instituted a midnight shift.

The company paid time and one seventh for the work performed on the midnight shift thereby giving rise to the grievance before us.

5. Promissory estoppel is defined in Halsbury's 4th Edition V. 16 as follows:

When one party has by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced.

6. On the evidence before us we are unable to find that a clear and unequivocal promise or assurance was given which was intended to affect the legal relations between the union and the company. Mr. Campbell replied in the affirmative when asked an off-handed and ambiguous question with respect to the rate to be paid for certain shift work. It was never put to him that the decision of the company to institute a night shift was dependent on his response or that the company was seeking some modification to the collective agreement in respect of a particular piece of work. The rate to be paid is clearly and unambiguously set out in the collective agreement. Mr. Campbell had no reason to believe that the company was not fully aware of its obligations under the agreement or that his response to the suggestion put to him by Mr. Solomon might somehow alter the content of the written bargain. Even if we accept that Mr. Solomon mentioned a 1:00 a.m. start to the shift in question, we are unable to conclude that a casual conversation of the type which transpired between Mr. Solomon and Mr. Campbell, without express reference to the purpose of the conversation and the consequence flowing from the union representative's answer, as perceived by the company, could somehow affect the legal obligations between company and union as established under the duly executed and signed collective agreement between them.

7. Having regard to the foregoing, we are unable to find that a promissory estoppel exists in this case as would allow the company to disregard its legal obligations and prevent the union from relying on its legal rights. The union is entitled to have the collective agreement enforced and accordingly, we hereby find that the company was in violation of the collective agreement when it failed to pay time and one half for the work performed at the Elm Street site on the midnight shift between August 25 and September 10, 1982. We hereby direct the company to pay to the union, for disbursement to its affected members, the difference between what it paid and the time and one half it was required to pay for the work in question. We will remain seized in the event of any difficulty with the implementation of our order.

1088-82-M Labourers' International Union of North America Local 183, Applicant, v. **C.D.C. Contracting**, a division of Patron Contracting Limited, Respondent

Collective Agreement – Construction Industry Grievance – Whether employer bound by collective agreement re sewer and watermain work – Whether document collective agreement or agreement to enter into two collective agreements – Whether concrete and drain agreement covering sewer and watermain work – Whether obligation to remit continuing after expiry of agreement

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members P. J. O'Keeffe and J. A. Ronson.

APPEARANCES: *W. Jackes, J. Colacci and Michael J. Reilly for the applicant; Robert Statton and Pat Pellitteri for the respondent.*

DECISION OF THE BOARD; November 1, 1982

1. This is an application brought under section 124 of the Act in which it is alleged that the respondent employer, as party to a collective agreement with the applicant, has failed to make the required remittances in respect of welfare, pension, vacation pay and statutory holiday pay, industry fund, training fund, working dues and regular monthly dues.

2. The respondent took the position at the outset that it was not bound by a collective agreement in respect of sewer and watermain work. It is primarily engaged in sewer and watermain work. It is primarily engaged in sewer and watermain work.

3. The applicant union introduced into evidence an agreement between itself and the respondent company dated September 9, 1981. This agreement, hereinafter referred to as the short agreement, was signed by both parties and provides in part:

(1) The Union and C.D.C. agree to execute the present standard industry collective agreements in the concrete and drain industry and the sewer and watermain industry forthwith, and the future renewals thereof.

(2) C.D.C. agrees to provide the Union with a list of its projects currently in progress.

(5) The Union and C.D.C. acknowledge and agree that the terms and conditions of the Collective Agreement executed by the Union and C.D.C. shall be only effective as of May 1, 1982 for the concrete and drain agreement and April 28, 1982 for the sewer and watermain agreement, except as provided for in paragraph 4.

The applicant takes the position that this document constitutes a binding collective agreement covering the sewer and watermain work performed by the respondent company.

4. The applicant union also introduced into evidence another agreement between the parties dated September 9, 1981, hereinafter referred to as the concrete and drain agreement. This document takes the form of a collective agreement and provides in Article 2 as follows:

RECOGNITION:

2.01 The Employer recognizes the Union as the sole and exclusive bargaining agent for all construction employees of the Employer employed in concrete and drain work while working in and out of Ontario Labour Relations Board geographic area No. 8, save and except non-working foremen and persons above the rank of non-working foreman.

2.02 If and when the Employer, or any shareholder(s) holding a major equity of control therein, shall perform or shall cause to be performed any work covered by this Agreement under its own name or under the name of another as a person, corporation, company, partnership, enterprise, associate, combination or joint venture, provided the Employer has a majority position, this Agreement shall be applicable to all such work performed under the name of the Employer or the name of any other person, corporation, company, partnership, enterprise, associate, combination or joint venture.

This agreement goes on to provide in article 10.04 as follows:

If the Employer performs work covered by the Union's other collective agreements, as set out below, the work shall be performed under this Agreement according to the terms and conditions of the Union's applicable agreement:

(a) "The Roads Agreement" being a collective agreement between the Metropolitan Toronto Road Builders' Association and A Council of Trade Unions acting as the representative and agent of Teamsters Local 230 and the Union.

(b) "The Sewer and Watermain Agreement" being a collective agreement between the Metropolitan Toronto Sewer & Watermain Contractors' Association and A Council of Trade Unions acting as the representative and agent of Teamsters Local 230 and the Union.

(c) "The Heavy Engineering Agreement" being a collective agreement between the Heavy Construction Association of Toronto and the Union.

(d) "The Forming Agreement" being a collective agreement between the Ontario Form Work Association and the Form Work Council of Ontario.

(e) "The Apartment Builders Agreement" being a collective agreement between the Metropolitan Toronto Apartment Builders' Association and the Union.

(f) "The Utilities Agreement" being a collective agreement between the Utility Contractors' Association on [sic] Ontario and Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Unions.

5. After entertaining extensive submissions from the parties, the Board recessed and then made an oral ruling which it hereby confirms. The Board ruled, relying on the language of para 1. of the short agreement, which stipulates that the parties "agree to execute the present standard industry collective agreements in the concrete and drain industry and the sewer and watermain industry forthwith" and the language of para. 5 which speaks of "the collective agreements executed by the union and C.D.C.", that the short agreement is not a collective agreement within the meaning of the Act. The Board ruled that the short agreement was not a collective agreement but in fact an agreement to enter into two collective agreements.

6. The Board went on to rule that the concrete and drain agreement, under which the employer recognizes "the union as the sole and exclusive bargaining agent for all construction employees of the employer in concrete and drain work ..." constitutes a collective agreement within the meaning of the Act to which the applicant trade union and the respondent employer are bound. There is no other collective agreement between the parties.

7. With the exception of a limited amount of concrete and drain work performed in the late fall of 1981, the respondent employer has worked exclusively in sewer and watermain construction since entering into the concrete and drain collective agreement with the applicant union on September 9, 1982. The respondent argues that because it is not a party to a collective agreement with the applicant covering sewer and watermain work, it is not liable for any remittances in connection with the sewer and watermain work performed by it. The applicant union, relying on article 10.04 of the Concrete and Drain Agreement, maintains that the employer is liable for all of the remittances required under the Sewer and Watermain Agreement. The employer responds by arguing that article 10.04 of the Concrete and Drain Agreement covers only those employees of the company who have performed concrete and drain work for the company and are subsequently assigned to sewer and watermain work. In any event, the respondent takes the position that because the Sewer and Watermain Agreement ceased to operate on August 25, 1982 there can be no obligation under article 10.04 of the Concrete and Drain Agreement to make remittances in accord with the Sewer and Watermain Agreement from that date forward. There is no dispute that the Sewer and Watermain Agreement ceased to operate in accord with the Act on August 25, 1982.

8. We hereby confirm our oral ruling given at the hearing that article 10.04 of the Concrete and Drain Agreement obligates the employer to perform sewer and watermain work under the Concrete and Drain Agreement according to the terms and conditions set out in the Sewer and Watermain Agreement. Article 10.04 is framed to cover all sewer and watermain work performed by the employer. It brings that work

within the scope of the concrete and drain agreement but incorporates by reference the terms and conditions contained in the Sewer and Watermain Agreement. The employer cannot escape the effect of article 10.04 by maintaining a separate group of employees to perform sewer and watermain work. If the employer performs sewer and watermain work, as did the respondent in this case, that work is performed under the concrete and Drain Agreement and the terms and conditions of the Sewer and Watermain Agreement apply.

9. Having regard to the foregoing, the Board ruled that from the period September 9, 1982 to August 25, 1982 the employer was bound by article 10.04 of the Concrete and Drain Agreement and accordingly, was required to make all of the remittances stipulated in the Sewer and Watermain Agreement for all sewer and watermain work performed in the period September 9, 1981 to August 25, 1982. The Board did not rule on the quantum but remitted the matter back to the parties and remained seized in the event the parties could not agree.

10. Turning to the period after August 25, 1982. Article 10.04 of the Concrete and Drain Agreement does not expressly address the intent of the parties in the eventuality that one of the "applicable agreements" referred to in article 10.04 ceases to operate during the term of the Concrete and Drain Agreement. In the absence of express language in this regard, there are two possible interpretations which can be given the language of article 10.04. The parties may have intended to give the employer an absolute discretion with respect to determining the terms and conditions which are to govern the performance of work under an "applicable agreement", pursuant to article 10.04 of the Concrete and Drain Agreement, after the "applicable agreement" has ceased to operate but before it is renewed. Conversely, the parties may have intended that in these circumstances the terms and conditions contained in the "applicable agreement" prior to its ceasing to operate would continue to govern the performance of this work until a renewal "applicable agreement" is in place.

11. In the face of the obvious intention of the parties to regulate the performance of this work and to provide for specified terms and conditions of employment in respect of it under article 10.04, we are inclined to the view that the parties intended the terms and conditions of the "applicable agreement" to continue to govern the performance of work under article 10.04 of the Concrete and Drain Agreement after it ceases to operate but before a renewal "applicable agreement" is in place. We do not accept that the parties would have intended to regulate the terms and conditions pertaining to this work except in the event, and for however long, an "applicable agreement" ceases to operate. The better interpretation, and the one that we adopt, requires the employer, if performing work under article 10.04, to provide the terms and conditions under the "applicable agreement" even where the "applicable agreement" has ceased to operate and has not yet been renewed.

12. The evidence in this case is that the employer performed sewer and watermain work under article 10.04 of the Concrete and Drain Agreement after August 25, 1982; the date after which the Sewer and Watermain Agreement (the "applicable agreement") ceased to operate. Having regard to all of the foregoing, the employer is required under article 10.04 of the Concrete and Drain Agreement to provide terms and conditions in

accord with the expired Sewer and Watermain Agreement in respect of this work and we hereby so declare. Accordingly, the employer is hereby directed to make the remittances to the union which would have been made had it abided by the provisions of article 10.04 of the Concrete and Drain Agreement. We will remain seized in the event of any difficulty with the implementation of our award in this matter.

1187-82-R Copeland Refrigeration Independent Employees' Association, Applicant, v. **Copeland Refrigeration of Canada Limited**, Respondent v. International Union of Electrical Radio and Machine Workers (AFL CIO CLC), Intervener

Certification – Trade Union Status – Whether employer support precluding certification of applicant employee association – Charges of incumbent union not established

BEFORE: Kevin M. Burkett, Alternate Chairman, and Board Members I.M. Stamp and H. Kobryn.

APPEARANCES: *Michael G. Horan, Ross Hayden and Betty Colling for the applicant; Robert A. Macpherson, Gary Stroud and David Tennant for the respondent; Alick Ryder, Q.C. and Jeff Smith for the intervener.*

DECISION OF THE BOARD; November 1, 1982

1. This is an application for certification in which the applicant seeks to displace the International Union of Electrical Workers Local 554,
2. The applicant organization has never proven itself to be a trade union within the meaning of the *Labour Relations Act*. Accordingly, the Registrar, by letter dated September 24, 1982, advised the applicant that it must be prepared at the hearing scheduled in this matter to satisfy the Board, in accord with its usual practice, that it is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Mr. Ross Hayden, the former president of the International Union of Electrical Workers' local comprised of employees of the respondent, and the current president of the applicant association, testified in support of the applicant's claim for trade union status. It is his evidence that the members of the bargaining unit were dissatisfied with the representation provided by the incumbent trade union and that he was asked by fellow bargaining unit employees to investigate the possibility of representation by an independent association. It is his evidence that he contacted the vice-president of the independent employee association which holds the bargaining rights for the employees of the Keeprite Company in Brantford and asked him to attend an executive meeting of the incumbent local at which the decision was made to "go independent". This decision

was confirmed at a general membership meeting. At a subsequent membership meeting held on September 20, 1982 in Brantford, a number of steps were taken to bring into existence the Copeland Refrigeration Independent Employees' Association. Minutes of that meeting were put into evidence and establish that a constitution, which has as one of its objects the regulation of relations between employees and employer and provides for the calling of meetings and the election of officers, was placed before the employees of the respondent for approval. The employees attending the meeting applied for, were accepted into membership, and ratified the aforementioned constitution. Nominations were then called for and officers elected pursuant to the constitution.

4. Having regard to all of the foregoing, we are satisfied that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

5. The intervener trade union alleges that the applicant is the recipient of employer support within the meaning of section 13 of the Act. Section 13 stipulates:

The Board shall not certify a trade union if any employer or employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

The intervener maintains, therefore, that the Board cannot certify the applicant and must dismiss the application.

6. The intervener's allegations are set out in two letters. The first, dated October 8, 1982, reads:

We have been retained by the International Union of Electrical, Radio and Machine Workers, and its Local 554 with respect to the above-captioned matter.

We have been instructed that the creation of the Applicant is part of a corporate plan of the Respondent's corporate officers at Sidney, Ohio, in the United States, to rid itself of our client in its plants in the United States and in Brantford. In addition, as part of this plan, the Respondent has decided that if a plant has to be closed, as part of an overall restraint program, a union or organized plant will be selected over a non-union plant.

The corporate policy I have described above is now effecting the current negotiations between our client and the Respondent and the wages which the corporate offices are prepared to make available to the employees in the bargaining unit are less than they would be if our client's bargaining rights were terminated.

In the circumstances, it will be our position that the Applicant is not entitled to be recognized as a trade union under the Labour Relations Act, and that further, the circumstances destroy the

capacity of the employees to fairly express their wishes in any representational vote that may be ordered.

The second letter, dated October 14, 1982, reads:

I am writing in response to your letter of today.

The information set out in our charges of October 8, were revealed to our client by Mr. Gary Stroud, Plant Manager of Copeland Refrigeration in Brantford. In addition to the circumstances set out in our letter of October 8, Mr. Stroud also advised our client that the employees had been assured that they would not suffer any financial loss as a result of "going independent". This assurance refers no doubt to the loss of the I.U.E. Pension Plan which would result if our client is displaced.

As to the significance of these circumstances, we wish to say that we are not claiming in these proceedings any remedy against the employer. It is our view, however, that the applicant, because of the circumstances, cannot be regarded as a trade union in view of section 13 of the Labour Relations Act.

7. The Board, having heard extensive evidence pertaining to these allegations, has not been satisfied that the applicant trade union received employer support within the meaning of Section 13 of the Act. There is no evidence that the employer played any direct role whatsoever in the formation of the applicant association. The Board heard evidence from Mr. J. Smith, the representative of the intervener trade union assigned to service the Copeland local, concerning admissions made to him by Mr. Gary Stroud, the president and general manager of the company's Canadian operation, of a corporate plan to rid itself of the intervener union. Mr. Stroud denied that he had made these admissions and, in any event, there is no evidence that Mr. Stroud or anyone else acting on behalf of the company informed the employees of such a plan or in any way voiced a preference for the applicant over the intervener trade union. Mr. Stroud did advise Mr. Hayworth of the benefits of the company's in-house pension plan over that provided by the intervener union but he did so prior to the advent of the applicant and at a time when Mr. Hayworth, as president of the intervener local, made inquiries of him with respect to the relative benefits of the company's in-house pension plan. Subsequent to the discussion between Messrs. Stroud and Hayworth concerning the company's pension plan, senior officials of the intervener trade union met with the employees of the respondent to discuss the concerns of the employees with respect to the adequacy of the union pension.

8. Mr. Smith testified that when he was informed that a displacement application for certification had been filed, he called Mr. Stroud at his office and discussed the matter with him. It is his evidence that after asking if he was using a speaker phone and being assured that he was not, Mr. Stroud reiterated that the corporation had a game plan to get rid of the union and was considering moving from Brantford, stated that the employees would get up to 30% less than the settlement negotiated in the United States with the union if they remained with the incumbent union in Canada and advised Mr.

Smith that the employees "had been assured that they would not lose a thing as a result of going independent". Mr. Stroud, while acknowledging the telephone conversation with Mr. Smith on September 28th, denied that he had made these admissions. He had a different version of the conversation between them. We are forced, therefore, to choose between the uncorroborated testimony of the two witnesses. In the context within which the alleged admissions were made, we have not been satisfied that Mr. Stroud made the admission attributed to him. Indeed, it would be unusual to say the least, for a senior company official to make the admissions attributed to Mr. Stroud to the business representative of the union which a company is allegedly seeking to rid itself of.

9. We wish to comment specifically on the evidence of Mr. Smith that Mr. Stroud told him that the employees "had been assured that they will not lose a thing as a result of going independent". This is the only alleged admission which encompasses employer communication or other interaction with bargaining unit employees designed to aid or support the applicant trade union. Mr. Stroud testified that when Mr. Smith asked him if the employees were aware of the possible repercussions of going independent he interpreted the question as an invitation to speculate and responded that it was his position that the employees should not lose anything. He denied that he told Mr. Smith that the employees had already been assured in this regard. The notes taken by Mr. Smith at the time of his telephone conversation with Mr. Stroud on September 28th were put in evidence. These notes simply state "employees won't lose anything". When Mr. Stroud elaborated on his contemporaneous notes later that day, he wrote the words "were assured" in reference to risk of employees losing benefits as a result of going independent. His typed reconstruction of both the questions he posed and the answers allegedly given by Mr. Stroud, which was done three days after the conversation, shows Mr. Stroud as saying that the employees "have been assured" in this regard. Mr. Stroud's recollection of what he said at the time is consistent with the notes taken by Mr. Smith at the time of the conversation. When reference is had to this fact, to the failure of Mr. Smith to follow-up with any further questions as to the time and place or other circumstances related to the giving of what would have been unlawful and damaging assurances, and to the absence of any direct evidence related to the giving of such assurance, we are forced to accept Mr. Stroud's version of the conversation.

10. We have not been satisfied on the evidence that the applicant union has received employer support within the meaning of section 13 of the Act and we hereby so find.

11. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Brantford save and except foremen, persons above the rank of foreman and office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on October 4, 1982, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. The Board, in the exercise of its discretion under section 7(2) of the Act, hereby orders that a representation vote be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

14. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

15. The matter is referred to the Registrar.

1273-82-R International Brotherhood of Painters and Allied Trades – Local 1819 – Glaziers, Applicant, v. C T Windows Limited, Respondent

Bargaining Unit – Certification – Construction Industry – Parties agreeing to unit restricted to ICI sector only – Section 144 mandatory – Board not accepting agreement – Adding “all other sectors” for several Board areas – Glaziers not qualified under *Apprenticeship and Tradesmen’s Qualification Act* – Whether regulation exempting employees – Matter relisted to receive submissions

BEFORE: D. E. Franks, Vice-Chairman, and Board Members I. M. Stamp and W. F. Rutherford.

APPEARANCES: *John Kemp and Lennart Anderson for the applicant; B.W. Binning and C. Tarneja for the respondent.*

DECISION OF THE BOARD; November 22, 1982

1. This is an application for certification pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 4, 1978, the designated employee bargaining agency is the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construc-

tion industry referred to in clause e of section 117 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The applicant has requested a bargaining unit of all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman. The respondent is in agreement with this bargaining unit with one exception to which we will return. The Board, however, is of the view that section 144 of the Act is mandatory in terms of the appropriate bargaining unit in the instant application, thus the Board cannot accept the agreement of the parties to limit the application to the industrial, commercial and institutional sector of the construction industry. Therefore, the Board finds that all glaziers and glaziers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all glaziers and glaziers' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The caveat by the respondent with respect to the above bargaining unit is that the term "glaziers" implies journeymen glaziers. The provincial agreement to which the applicant local is a party provides the following bargaining unit in Article 2:

"2.01

The association recognizes the Union as the exclusive bargaining agent for employees of employers engaged in the Industrial, Commercial and Institutional sector of the Construction Industry, for whom the Union has bargaining rights.

2.02

An employee is defined as a Journeyman Glazier Metal Mechanic, Working Foreman, Lead Hand or Apprentice working for any individual firm, co-partnership or corporation. He shall be in good

standing with the Union and be a recognized apprentice or completed his apprenticeship and passed a required examination as to his proficiency as a mechanic to perform the duties pertaining to a Glaziers Metal Mechanic as an employee.”

It will be seen from the above bargaining unit that the collective agreement affecting the employees contemplates only journeymen or apprentices and it would appear, therefore, that the qualification requested by the respondent in the above bargaining unit of journeymen glaziers would in fact be redundant since the term “glazier” would normally mean journeymen glaziers as distinct from apprentice glaziers.

6. In view of the finding with respect to the foregoing bargaining unit, the respondent takes the position that there are no glaziers or glaziers’ apprentices in its employ. The applicant filed in support of this application three membership documents and there is no dispute that the documents relate to persons in the employ of the respondent. Nor is it disputed that none of the three persons in the employ of the respondent are apprentice glaziers or journeymen glaziers and in particular journeymen glaziers with respect to the *Apprenticeship and Tradesmen’s Qualification Act* R.S.O. 1980, c.24. The respondent urges the Board to follow its decision in *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.* [1981] OLRB Rep. Nov. 1594. In that case the Board excluded certain employees from a list of employees in a bargaining unit of sheet metal workers and sheet metal workers’ apprentices. Those employee who were not certified journeymen or registered apprentices under the *Apprenticeship and Tradesmen’s Qualification Act*, notwithstanding the fact that the employees were working at sheet metal work. In the present case, it is not disputed that the employees in question are working at “glaziers work”. The argument of the respondent is that since they are not glaziers or glaziers’ apprentices, and indeed, have no qualifications other than that two employees have had minor work experience doing installation of this type. In accordance with the *Irvcon* decision the Board should therefore find that they are not glaziers nor are they apprentices and, accordingly, there are no employees in the bargaining unit.

7. In the *Irvcon* case the Board dealt with this issue as follows:

“6. The present case raises a significant policy problem with respect to bargaining units in the construction industry. A review of previous Board certificates granted to the sheet metal workers union indicates that in a number of situations the Board has described such units as ‘all sheet metal workers and sheet metal workers apprentices’. In other cases the Board has described the bargaining unit as ‘all journeymen sheet metal workers and sheet metal apprentices’. In only one case apparently, on agreement of the parties, was the unit described as ‘all journeymen sheet metal workers and registered apprentice sheet metal workers’. In the present case therefore the applicant trade union is asking the Board to develop a practice of describing the appropriate bargaining unit as referring to ‘journeymen sheet metal workers and to registered sheet metal apprentices’. The applicant’s reason for making such a request relates directly to *The Apprenticeship and Tradesmen’s Qualification Act*. According to that Act, a person who is neither a journeyman sheet metal worker

nor a registered apprentice is prohibited from lawfully working at the sheet metal trade. Thus, at the hearing in this matter, the representative of the sheet metal workers union clearly admitted that such persons would not be taken into membership, and further would be outside the ambit of the collective agreement to which the sheet metal workers union is party.

7. In the context of the present case, of course, to adopt the applicant's position would mean that the employees in question are not employees in the bargaining unit. They would not be entitled to any voice in the determination as to whether the applicant trade union should be entitled to represent sheet metal workers, but it also follows that if the applicant trade union were certified they would not be able to continue as employees unless they became registered apprentices.

8. The respondent takes the position that the employees in question are working in the sheet metal industry and should therefore be included in the count.

9. We are of the view that the disputed employees should not be listed as employees in a bargaining unit. Section 10 of *The Apprenticeship and Tradesmen's Qualification Act* is quite clear:

'10.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection 4, shall work or be employed in a certified trade unless he holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection 4, in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.'

By Regulation 298/73 the Lieutenant Governor in Council designated the trade of sheet metal worker as a certified trade for the purposes of that Act. It is our view that the appropriate bargaining unit for collective bargaining with respect to sheet metal workers should reflect that designation. Accordingly, in the present case the bargaining unit shall be described in terms of 'journeymen sheet metal workers and registered sheet metal apprentices'. It follows,

therefore, that the three employees in question will not be employees on the list of employees for the purposes of the count."

Like the Sheet Metal Worker, the "Glazier and Metal Mechanic" has been designated as a certified trade pursuant to section 11(1) of the Act. (See R.R.O. 1980 O. Reg.39). The representative of the applicant trade union suggested that the glaziers are a "voluntary" certified trade whereas the sheet metal workers are a "compulsory" certified trade. No reference, however, was given for the basis for this distinction. In the *Irvcon* case, the Board relied on the broad prohibitions in section 11(2) (then section 10(2)) of the *Apprenticeship and Tradesmen's Qualification Act* in holding that the employees were not to be included in the appropriate bargaining unit.

8. In the present case, however, the Board is concerned about the application of O. Reg. 36, the general regulation under the *Apprenticeship and Tradesmen's Qualification Act* and in particular section 5 thereof which reads:

"Sections 9 and 10 and subsection 11(2) of the Act do not apply to persons,

(a) permanently employed in an industrial plant while performing work entirely within the plant and premises or on the land appertaining thereto, except work performed in the maintenance and repair of motor vehicles, trailers or conversion units registered for use on a highway under the *Highway Traffic Act*; or

(b) while engaged in a trade or occupation that in the opinion of the Director is not one in respect of which compliance with sections 9 and 10 and subsection 11(2) of the Act is required."

If the Director of Apprenticeship is not of the opinion that section 11(2) of the Act applies to glaziers then the proscribed conduct on which the *Irvcon* bargaining unit was based is not relevant to the present case.

9. The Registrar is directed to list this matter for continuation of hearing to hear the evidence and representations of the parties with respect to the issue raised in paragraph 8 above.

2245-81-M Ontario Sheet Metal Workers' Conference, Applicant, v. **Culliton Brothers Limited**, Respondent, v. Ontario Sheet Metal and Air Handling Group, Intervener.

Construction Industry – Construction Industry Grievance – Damages – Practice and Procedure – Remedies – Previous Board decision finding employer bound by Provincial Agreement – Damages running from date grievance brought to employer's attention – Employees' wishes irrelevant to operation of deemed recognition provision – Whether union entitled to demand discharge of employees employed contrary to agreement – Whether employees having reasonable notice and opportunity to apply for membership

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and C. A. Ballentine.

APPEARANCES: *A. M. Minsky for the applicant; G. Grossman and K. A. Culliton for the respondent; Keith Billings and L. Cianfarani for the intervener; R. C. Sills for David Davies, George Warnock, John Brennan, Mike Young and Brian Schade, a group of employees of the respondent's Sheet Metal Division.*

DECISION OF VICE-CHAIRMAN, N. B. SATTERFIELD AND BOARD MEMBER W. H. WIGHTMAN; November 10, 1982

1. The matters herein arise out of a decision of the Board, differently constituted, which issued March 17th, 1982 (reported at [1982] OLRB Rep. March 357) with respect to a referral of a grievance in the construction industry. The Board found in that decision that the applicant and the respondent were bound to a provincial agreement between the Ontario Sheet Metal and Air Handling Group ("the Group") and the Sheet Metal Workers' International Association ("the Association") and Ontario Sheet Metal Workers' Conference ("the Conference"). It was effective from May 1, 1980 until April 20th, 1982. The Board reached that conclusion based on findings of fact that the Association's Local Union 47 ("Local 47") was certified as bargaining agent for "all sheet metal workers and sheet metal apprentices in the employ of [Culliton Brothers Limited] in the United Counties of Stormont, Dundas and Glengarry . . .", which resulted in Local 47 and the respondent becoming bound immediately to a collective agreement between Local 47 and an accredited employers' association (the Mechanical Contractors' Association Ottawa). They continued to be bound to a series of successive collective agreements with respect to the industrial, commercial and institutional ("ICI") sector of the construction industry culminating with the aforesaid provincial agreement. Prior to May 1, 1980, the respondent was bound to the provincial agreement only to extent of the bargaining rights held by Local 47. Section 137(2) of the *Labour Relations Act* came into force effective May 1st, 1980 and, pursuant to that section, the respondent was deemed to recognize all of the affiliated bargaining agents of the Conference and the Association, which together comprise a designated employee bargaining agency, as bargaining agents for the sheet metal workers and sheet metal apprentices employed in the ICI sector. Generally speaking, these affiliated bargaining agents are the Conference's constituent local unions.

2. In the course of tracing the events from the certification of Local 47 through to the deemed extension of those bargaining rights pursuant to section 137(2) of the Act,

the Board made the following comments and observations about the conduct of Local 47 and the respondent with respect to those events.

15. The respondent concedes that on August 24, 1976, it was bound by the collective agreement between Local 47 and MCAO, which was in effect from May 1, 1975, until April 30, 1977, by virtue of sections 127(2) and 128(4) of the Act. The respondent made this concession with hindsight at the hearing. Between August 24, 1976 [when the Board's certificate issued to Local 47], and November 2, 1976 [the date when Local 47 and the respondent were advised by the Minister of Labour that no conciliation board would be appointed with respect to the collective bargaining which had been taking place directly between them], and for some time thereafter, neither the respondent nor Local 47 were aware of the results which flowed from the certification under a regime of accreditation and an existing collective agreement. On August 24, 1976, the respondent and Local 47 were bound by the terms of the collective agreement with respect to the geographic area set forth in the bargaining unit in the certificate of the Board in the industrial, commercial and institutional sector and the residential sector of the construction industry. It appears that the respondent's solicitor had forgotten about the certificate of accreditation and the results which flowed from it and that Local 47 was unaware of the effect of accreditation on its own certificate. The comedy of errors was compounded when Local 47 requested and received the appointment of a conciliation officer from the Minister of Labour followed by the subsequent decision of the Minister of Labour not to appoint a Board of Conciliation. Unhappily, such conduct in the face of an existing collective agreement is by no means unique. See, for example, *Kroman's Electric Limited* (Board File No. 1842-76-M, unreported decision dated March 16, 1977); *Napev Construction Limited* (Board File No. 1112-77-M, unreported decision dated December 28, 1977) and *Sinclair Welding Limited* (Board File No. 1914-79-R, unreported decision dated February 4, 1980).

16. The conduct of the respondent and Local 47 in purporting to bargain for a collective agreement in 1976 and the subsequent appointment of a conciliation officer and the subsequent decision by the Minister of Labour not to appoint a Board of Conciliation was of no lawful effect with respect to the bargaining unit contained in the collective agreement which was in effect from May 1, 1975, until April 30, 1977. The respondent and Local 47 were prohibited by section 131(1) from individual bargaining with respect to the industrial, commercial and institutional sector and the residential sector. Moreover, the respondent and the employees represented by Local 47 would not have been in a position to engage in a lawful lock-out or a lawful stike with respect to the industrial, commercial and institutional sector and the residential sector having regard to the provisions of section 72(1).

The Board also considered and rejected the arguments of respondent counsel that the bargaining rights acquired by Local 47 in August 1976 had been abandoned and that the applicant was estopped by its conduct from asserting that the province-wide collective agreement should apply to the respondent.

3. The respondent's place of business is in the City of Stratford and it has a branch location in St. Mary's, Ontario. When Local 47 was certified by the Board in 1976, however, the respondent was employing sheet metal workers on a construction project in the City of Cornwall. The five employees affected by this referral work out of the respondent's location in the City of Stratford. They all attended the hearing which gave rise to the Board's March 17th decision. Paragraph 22 of the Board's March 17th decision had this to say about those employees:

"The position of the respondent's present employees who are not members of the applicant raises an important question. In section 137(2), the Legislature extended bargaining rights by means of deemed recognition of affiliated bargaining agents. This section is silent on the wishes of such employees. *It was not suggested that the applicant is under any requirement either to offer these employees membership or not to require the termination of their employment with the respondent.*"

(emphasis added)

4. Paragraph 23 of that same decision states as follows:

"The Board has determined that there is a collective agreement in effect and directs the Registrar to list the matter for continuation of hearing on the issue of the amount of damages. *The question of the position of the respondent's present employees may be raised at that time.*"

(emphasis added)

It is that direction which has brought these matters before the Board as constituted herein at a hearing which was held on July 27th 1982. The issue of damages raises the question of the date from which damages should flow. Counsel for the conference advised the Board that it was abandoning any claim for damages prior to January 15th, the date on which he assumed the respondent had first received notice of the grievance. Counsel for the respondent contended the appropriate date was March 17th and wanted protection for any contracts awarded to the respondent prior to the grievance. On the second matter, that is the question of the position of the respondent's present employees, raises important questions for the Board, ones which it has not dealt with before, at least in any reported decision, making this a case of first impression on that matter. When the operation of section 137(2) of the Act has bound an affiliated bargaining agent, an employer and his existing employees to a provincial agreement which contains a requirement that the employer employ only members in good standing of the affiliated bargaining agent, what are the obligations of the agent, the employer and the employees? Can the affiliated bargaining agent require the employer to discharge its employees

who, at the time the employer became bound to the agreement, were not members of the agent? Is the affiliated bargaining agent obligated to take the employees into membership if they apply?

5. The Board heard, at the outset of the hearing, the submissions of the parties with respect to some preliminary issues and, as a result, ruled that it would hear the evidence and representations of the parties with respect to the date from which damages, if any, would flow and with respect to the status of the five employees. The Board ruled also that it would remain seized with respect to the amount of damages should the parties be unable to agree thereon.

6. Another preliminary issue was the status of the Group to intervene in this referral. In this respect, the Board's March 17th decision had the following to say at paragraph 2:

“The Ontario Sheet Metal and Air Handling Group (the “Group”) was served with notice of this referral and of hearing. The Group did not attend at the hearing. However, in a letter its counsel informed the Board that the Group endorsed the position of the applicant. . .”.

The Group received notice of the hearing in the instant proceedings and its solicitors advised the Board in a letter dated May 12th 1982 that it intended to appear at and participate in the proceedings. The grievance names the Group as an interested party. The grievance also contains allegations that the provincial agreement was violated by the respondent's failure to make payments, which are required of employees bound to the provincial agreement, to an industry fund in which the Group has a beneficial interest under the provincial agreement and for which the grievance seeks relief. Section 147(3) of the Act makes the Group, as a designated employer bargaining agency, a party for purposes of section 124. Having regard for these facts, the Board ruled that the Group was a party to these proceedings with respect to the matters to be heard by the Board but, having chosen not to attend the hearing of the Board, differently constituted, it must take the proceedings as it finds them.

7. There was also a preliminary issue whether the Group, being a party to the proceedings, could rely on the assertion of claim made on its behalf by the Conference. There was a further question of the effect, if any, on this claim of the Board's decisions in *J.G. Rivard Limited*, [1976] OLRB Rep. Sept. 540, upheld on review by the Divisional Court in an unreported decision which was released November 23rd, 1976, and *J.G. Rivard Limited*, [1980] OLRB Rep. July 1009. The Board reserved its decision on those issues subject to any further evidence and representations the parties might make in the hearing.

8. The five employees made application under section 57(2) of the Act to have the bargaining rights of the applicant terminated. (See Board File No. 0207-82-R, an application made on April 26th, 1982). The Board in that case adjourned the proceedings pending determination of the question referred to in paragraph 23 of the March 17th decision with respect to these employees. The Board in the instant case must deal with their status for the purposes of determining the relief, including damages, if any, to which the Conference may be entitled because of the respondent's employment of these

persons. Whether these findings affect the status of the employees to make application under section 57 of the Act will be a matter to be determined by the panel of the Board which hears that application.

9. Therefore, in summary, the issues with which this decision will deal are:

- (a) whether Culliton has breached the provincial agreement and, if it has, whether the Conference is entitled to relief, including damages;
- (b) the appropriate date from which to determine damages or any other relief;
- (c) the status of the five employees of the respondent with respect to the relief sought by the Conference; and
- (d) whether the Group can rely on the Conference's assertion of claim on its behalf for the damages which the Group is seeking.

10. The Board makes the following findings of fact from the evidence adduced at the hearing on July 27th, 1982.

11. The parties are agreed that David Davies, George Warnock, John Brennan, Mike Young and Brian Schade were employees of the respondent at all times material to this referral. They were not members of any of the constituent locals of the Conference at the time of the hearing, nor have they ever been members of any of those locals and, since the March 17th decision, they have not sought to become members or make formal application to become members. The parties are further agreed that Local 473 of the Association is a constituent local of the Conference and has administrative responsibilities under and for the provincial agreement for the geographic area which includes Stratford with respect to the matters at issue in this referral. Appendix "D" is the appendix of the provincial agreement applicable to that geographic area.

12. The respondent concedes and the Board finds that:

- (a) the respondent received on January 15th 1982, the letter from the Conference's solicitor dated January 14th, 1982, setting out the grievance herein together with a copy of the provincial agreement which expired April 20th, 1982;
- (b) the respondent received on January 27th, 1982, the letter dated January 25th, 1982, from the Conference's solicitor advising that the grievance was being referred to the Board pursuant to section 124 of the Act;
- (c) the respondent is bound to the new provincial agreement between the Group and the Association and the Conference which is effective from May 1st, 1982 to April 30th,

- (d) the respondent did not apply the terms and conditions and of the successor provincial agreement which expires April 30th, 1984.

13. The five employees whose status is at issue herein are the only sheet metal employees employed by the respondent. They work and have worked exclusively on sheet metal work and gas fitting with respect to the heating, air conditioning and ventilation work contracted by the respondent. Since January 15, 1982, the five of them, at one time or another, have performed work on the Regional Police Centre in Cambridge, Ontario, and on a few small "time and material" jobs within a fifteen mile radius of Stratford. They also performed a small amount of sheet metal work at a Hamilton hospital, although the respondent was uncertain whether this was just before or just after January 15th. The respondent obtained the contract for the Regional Police Centre job in August or September 1981 on bids made during that summer on the rates being paid at the time.

14. The five employees are usually sent out from the Stratford office to work at the various locations. Two of them, Brennan and Davies, worked on the Cornwall project which gave rise in August 1976 to the certification of Local 47, but were not on the project at that time. It may be inferred from the evidence that they were not there during the time when the union's campaign would have been taking place either. Brennan worked on that project during November and December 1976 and January 1977, following the certification but was not aware of it. Schade is the employee with the longest service, having been employed in September 1974. Brennan was employed in February 1975 and Davies in early 1976. The other two employees, Warnock and Young were hired in August 1979 and September 1981, respectively. Brennan, Davies and Schade are certified tradesmen under the *Apprenticeship and Tradesmen's Qualification Act*, R.S.O. 1980, c.24. Young and Warnock are registered apprentices under that Act.

15. The respondent has not attempted to hire members of the Conference or its constituent locals since it received the Conference's January 14th letter. Nor has it acted to terminate the employment of the five employees, but following the March 17th decision, it did advise them that they should apply for membership in the Association. This advice was given after the respondent consulted with its solicitors. The respondent did not pursue the matter any further after it received notice of the application for termination of bargaining rights. The employees were not approached by the Conference or any of its locals with respect to joining the Association or with respect to the requirements of membership contained in Article 8 of the provincial agreement.

16. The respondent has admitted and the Board has found that since January 15th, 1982, it has not performed under the terms of the provincial agreement which expired April 30, 1982 or its successor. It follows and the Board finds, therefore, that the respondent has been in violation of the applicable agreement since January 15th. Its violation of the successor agreement was continuing on July 27th, 1982. The respondent's violations included employing employees who were not members of any of the Conference's local unions contrary to the requirements of Article 8 - Union Security - of the provincial agreement. Article 8 states as follows:

- 8.1 The employer agrees it shall be a condition of employment for all employees covered by the terms of this Agreement, to be a

member of, and to maintain membership in good standing, in one of the local unions.

That violation, according to counsel for the Conference, has resulted in the respondent being in violation of other articles such as those with respect to the payment of wages, vacation and holiday pay, contributions to Local 473's welfare and pension plan and to the London Sheet Metal Contractors Association industry fund. It is evident that the respondent has violated the provincial agreements independent of the union membership provisions. For example, the respondent has not paid contributions to the various trust funds as the agreements require. Furthermore, while the Board has no evidence before it about the actual wages paid, to the extent that the respondent has paid less than the rate of wages, vacation and holiday pay, it would be in violation of the two agreements.

17. The relief sought by the Conference on its own behalf, its local unions and their members includes monetary damages, including interest, for all violations of the provincial agreement resulting from failure to make the various payments required under the agreement and its appendices. Counsel for the Conference claims that it is entitled to relief on grounds similar to those on which a board of arbitration in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America*, (1973) 4 L.A.C. (2d) 254 (O'Shea) made a monetary award to a union on behalf of its members because of the employer's violation of the union security clause in the collective agreement which required preferential hiring of the union's members through a hiring hall procedure. The arbitration Board's jurisdiction to award damages on behalf of members of the union who were not employees was upheld by the Ontario Court of Appeal in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America*, (1975) 57 D.L.R. (3d) 199. The court's reasons for its judgement includes the following comments about the union's right to make a claim on behalf of such members with respect to benefits under the agreement of preferential hiring and welfare and vacation pay trust fund:

"... the union as a party to the agreement may claim on behalf of its members the loss of these benefits and this quite independently of the member's right to grieve."

The Conference asserts that its local unions had members in good standing at all material times when the respondent was employing the five employees, who were not members in good standing of any of these locals, to perform work covered by the collective agreement. These members, it claims, were entitled to the benefit of Article 8 and Article 21 – Hiring Procedure of the provincial agreement. It is contended, therefore, that the Conference is justified in asserting a claim on their behalf for any monetary benefits of which they were deprived by the respondent's violation of Article 8.

18. The opportunity to pursue that claim, however, depends on whether Local 473, the affiliated bargaining agent holding jurisdiction, can require the respondent to discharge them. If it can, the Board is satisfied that the Conference would be entitled to monetary damages of the type it seeks provided it satisfies the other parties, or if necessary the Board, that unemployed members who would satisfy the requirements of Article 8 or Article 21 were available to the respondent. The Board does not have any

evidence before it that unemployed members of the Conference's local unions were available for employment by the respondent on and after January 15th, 1982 in the process of agreeing that the Board should remain seized with respect to damages, the parties also agreed it was not necessary for the Conference to call that evidence. The Board is not persuaded by the suggestion of counsel for the respondent that the circumstances under which the respondent became bound to the provincial agreement and came to violate it do not warrant application of the principles of the *Blouin Drywall* case. Once the respondent was put on notice of its potential liability by the January 14th letter from the Conference's solicitors, which included the notice that the respondent is "... required to adhere to and apply all of the terms and conditions of the Provincial Agreement in respect to [its] employment of sheet metal workers and their apprentices at their projects in Ontario, ...", the continuing violations were deliberate and not inadvertent or innocent as inferred by counsel.

19. The general principle applied by arbitrators for the calculation of damages for the violation of a collective agreement is that damages run from the date of the breach of the agreement. An arbitrator may make an exception to this general principle in circumstances where the respondent could not reasonably have had knowledge of the breach or where the conduct of the party asserting the claim for damages cause the arbitrator to apply such doctrines as equitable estoppel. In such circumstances, the date of filing of the grievance may be used instead of the date of the breach. Respondent counsel contends that the facts in this matter support the use of another date, March 17th, 1982, the date of the Board's decision in which it found that the respondent was bound by the then current collective agreement between the Group and the Association and Conference. A further branch of counsel's argument is that any damages to the Group should run only from May 12th, 1982, the date of the letter from its solicitors advising the Board that it would attend at the hearing to support its claim for damages. Moreover, respondent counsel contends that damages should apply only on contracts obtained after the March 17th decision. The Conference has abandoned any claim for damages for breaches of the collective agreement prior to the filing of its grievance and seeks damages instead from January 15th, 1982, the date when the respondent received the letter dated January 14th from the Conference's solicitors setting out the grievance. The date proposed by respondent counsel represents another exception to the general principle of damages running from the date of the breach of the collective agreement. Do the facts of this case require the exception?

20. Applicant counsel argues that his January 14th letter set out in detail the legal basis for its claim that the respondent was bound to the provincial agreement then in effect and to which the Conference was bound and, further, that the basis for the claim was later affirmed by the Board's March 17th decision. When there was no response to this letter, the January 26th letter was sent advising the respondent that the grievance was being referred to the Board and setting out the relief sought by the Conference. There was no reply to this letter and no performance under the collective agreement. Counsel asserts that the only action taken by the respondent with respect to its obligations under the agreement was to seek the advice of its solicitors with respect to the five employees and counsel them to contact Local 473 and that action was not pursued after the filing of the application for termination of bargaining rights. In short, counsel contends that the respondent has neither performed under the collective agreement nor acted to mitigate its damages since January 15th, 1982 up to and

including this hearing and is not entitled to exceptional consideration with respect to the date from which relief should be determined.

21. Counsel for the respondent submits that there are a number of significant factors which support the respondent's position. The Conference and Local 47, since November 1976, when the "no board" report was issued to Local 47 and the respondent, until February 16th, 1981 when Local 47 sent the respondent notice to bargain (see paragraph 10 of the March 17th decision), have conducted themselves as though the respondent was not bound to a collective agreement. After February 16, 1981 there was no further contact by the Conference or its constituents until the respondent received the January 14th, 1982 letter from the Conference's solicitors. Counsel suggests that it is not surprising that the respondent also has believed that it was not bound to any collective agreement with those parties and acted accordingly. All of the respondent's actions which are now the basis of the Conference's claim for damages and other relief were taken at a time when neither the Conference nor Local 47 were acting as though the respondent was bound to an agreement with either of them. He claims that these actions during the period February 16, 1981 to January 15, 1982 included successfully bidding on fixed-price jobs such as the Regional Police Centre job. Furthermore, the respondent's conduct has not been that of an employer who, knowing he was bound to a collective agreement, chose to ignore the terms of the agreement with respect to hiring and payment of his employees. Now, to saddle the respondent because of its innocent actions with damages which could result in the respondent paying twice for the work performed by the five employees since January 15th, 1982, would be to saddle it with a liability approaching bankruptcy. With respect to the period since the March 17th decision, counsel argues that the respondent could not act to mitigate its damages until it had clarification of the position of its employees with respect to the reference quoted in paragraph 3 hereof from the March 17th decision. In this respect, he claims that the respondent did all it could do when it advised the employees that they could apply for membership in the Association. Counsel contends that the Board should have due regard for all of these circumstances and for the need for economic certainty, particularly in the construction industry where fixed-price contracts are the rule, in setting the date for the determination of relief. In this respect he argues that, to adopt the date of March 17th, 1982 when the respondent's liability was established by the Board's decision and and to calculate damages with respect to future contracts, would be analagous to how the Board has exercised its discretion under section 1(4) of the Act in those cases where the Board's decision has excluded from its effect commercial commitments made prior to the decision issuing.

22. Counsel for the employees did not make any representations bearing directly on the question of the date for determining relief. Counsel for the Group adopts the same position as the Conference, in other words, that damages should flow from the date when the claim for damages was first brought to the respondent's attention by the January 14th, 1982 grievance letter.

23. The Board does not consider the circumstances of this case to warrant adoption of respondent's position that damages and other relief should be determined from March 17th, 1982, whether with or without the codicil that damages should only apply to commercial commitments made after that date. While it may have been understandable and reasonable for the respondent to believe prior to January 15th that it

was not bound to a collective agreement, it was not reasonable for the respondent to continue to believe and act as though it was not bound after that date. Certainly, from January 15th the respondent was aware of the claim that it was bound and that there was an issue to be litigated and an obligation to mitigate potential damages.

24. Furthermore, the facts indicate that earlier opportunities existed for the respondent to assess the risk of potential liability, notwithstanding the confusion surrounding the events following upon the issuing of the Board's certificate to Local 47 on August 24, 1976, and the failure of the parties to realize that they were bound by operation of statute to a collective agreement already existing pursuant to a regime of accreditation. The renewed interest of Local 47 when it sent the February 16th, 1981 letter referring to its certificate and containing notice of its desire to bargain was an indication at least that it considered that those bargaining rights continued to exist. By that time two major changes had taken place in construction industry collective bargaining pertaining to the ICI sector. There were the changes brought about by *Bill 22* referred to in paragraph 19 of the March 17th decision and by *Bill 204* referred to in paragraph 20. There was a great deal of publicity in the construction industry attendant upon the passage and ensuing implementation of both bills. The respondent has been operating a business in the construction industry continuously since February 1964 and in the last 10 years 80 per cent of its business has been in the ICI sector. (See paragraph 3 of the March 17th decision.) It is incumbent on it to be aware of any law and statute which might affect the operation of the business and of any obligations or potential liabilities which they pose for the business. Thus the February 16th, 1981 letter from Local 47 should have alerted the respondent to at least seek to satisfy itself whether it was exposed to any potential liability arising out of the outstanding bargaining rights and the *Labour Relations Act* as amended by *Bill 22* and *Bill 204*.

25. As a result of those same circumstances, even if the Board were attracted in principle to respondent counsel's proposition that in an appropriate fact situation the date of a decision establishing liability is the date from which damages should flow, the Board would not apply that principle here. The same warning signs referred to above were there for the respondent to read when it bid on the Regional Police Centre job. It had the opportunity to be aware of the potential risk of being bound by statute to a collective agreement and to take that risk into account in bidding the job. So it cannot be reasonably argued that the respondent could not have known the risk when it entered into that commercial commitment.

26. The Board directs, therefore, that January 15th, 1982 shall be the date from which relief, including damages, shall be determined for any breaches of the collective agreement continuing after or occurring on or after that date.

27. The relief sought by the Conference with respect to the five employees was set out in the following terms in the letter from its solicitors dated January 25, 1982 advising the respondent that the grievance filed in the January 14th letter was being referred to the Board.

"An order that Culliton employ only members in good standing of the affiliated local unions of the Conference to perform work in connec-

tion with any of its Projects in accordance with the Provincial Agreement and the Appendices thereto.”

• • •

“An Order that Culliton cease and desist from employing or continuing to employ persons at any of its Projects who are not members in good standing of any of the affiliated local unions of the Conference.”

At the hearing counsel for the Conference asked that the Board direct the respondent to discharge the five employees because they are not members of a constituent local of the Conference as required by Article 8 (see paragraph 16 above).

28. Counsel argues that when the respondent became bound to the provincial agreement by operation of section 137(2) of the Act, it was automatically and instantly bound by all provisions of the agreement. The Act does not provide for any grace period during which an employer is to be brought under a provincial agreement when it is caught by those provisions. Therefore when the Board's March 17th decision confirmed that the provincial agreement applied to the respondent, it was clear that article 8.1 would apply to the five employees and required that they be and remain members in good standing of one of the constituent local unions of the Conference. Yet they made no approach to any of the local unions to apply for membership even though the respondent advised them that they should do so. According to counsel, not only does their failure to seek membership in the Association signify that they do not want to be members, their application to terminate bargaining rights makes it clear that they do not want the Association to represent them in collective bargaining. These circumstances, counsel contends, leaves the Conference no alternative but to ask that the Board issue a direction to the respondent to discharge forthwith the five employees. To allow them to remain as employees and not require them to be members would be to grant them different terms of employment than employees of other employers bound to the provincial agreement. That, counsel contends, would be a violation of the Act as well as the provincial agreement because section 146(2) of the Act provides that there cannot be any other arrangement than the provincial agreement and excepting the five employees from the membership provisions of article 8.1 would constitute another arrangement.

29. Counsel for the Group supports the Conference's request for a direction from the Board that the employer discharge the five employees on the further grounds that the Board would be acting in excess of its jurisdiction under section 124 of the Act if it fashioned a remedy which permitted the employees not to become members of the Association and yet remain employed by the respondent on work coming within the scope of the provincial agreement. To do so, counsel argues, would constitute an alteration in the terms of the agreement.

30. Counsel for the employees argues that section 137(2) of the Act refers only to the deemed recognition by employers of trade unions in a particular fact situation. He points out that the section is silent with respect to employees' wishes and that the Board made the same observation in its March 17th decision and argues that, if the legislature had intended the application of section 137(2) to have the effect on their employment

status contended by counsel for the Conference, it would have said so in clear terms. Therefore section 137(2), being silent with respect to employees, should not be applied to abridge important rights of employees under the Act; for example, the freedom of employees to join a trade union of their own choice, which is protected by section 3 of the Act and the right to select their bargaining agent. Counsel argues that their right to decide who will represent them in collective bargaining should be decided by those sections of the Act which deal with representation rights and not by the windfall effect of section 137(2). Counsel for the respondent agrees fully with the proposition that the legislature could not have intended section 137(2) of the Act to abridge important rights of employees. Counsel sees this case as raising fundamental principles relative to the freedom of employees to join a trade union and to the concept of trade unions, as freely designated representatives of employees, bargaining with employers, a concept expressed in the preamble to the Act. It is inconsistent with this concept, counsel submits, for the bargaining agent responsible for representing the five employees with their employer to be seeking their discharge by the employer. Therefore any application of section 137(2) which would allow that result would be contrary to the objects of the Act referred to in the preamble.

31. Furthermore counsel for the employees contends that the Conference had an obligation to approach the employees and offer them the opportunity to become members of the Association as soon as the Conference began to assert its rights to represent them, and particularly after the March 17th decision confirmed that right. Its failure to do that and now to be seeking their discharge is a violation of clauses (b) and (f) of section 46(2) and of section 68 of the Act.

32. Finally, counsel expressed the view that to require the employer to discharge the five employees as a consequence of the application of section 137(2) of the Act might violate their rights protected by the *Ontario Human Rights Code*, R.S.O., 1981, c. 53 ("the Code") and the *Canadian Charter of Rights and Freedoms* ("the Charter"). He referred the Board to sections 4 and 5 of the Code and 2, 7 and 15(1) of the Charter. While any complaint under the Code should be made to and be dealt with by the Ontario Human Rights Commission, it seems to the Board in any event that section 4 of the Code, which deals with employment and section 5, which, *inter alia*, deals with membership in any trade union, prohibit discrimination on grounds entirely unrelated to the facts herein. Sections 2, 7 and 15(1) of the Charter are set out below together with section 1:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

33. One of the difficulties of dealing with the parties' arguments in this matter with respect to the status of the five employees is that the arguments have intermingled two separate issues, one before this Board and one before the Board as constituted to hear the application for termination of bargaining rights. The issue in the termination application is whether, at the time that application was made under section 57(2) of the Act, they were employees in the bargaining unit defined in the provincial agreement so as to have status to bring the application. As indicated already in paragraph 7 of this decision, that is a matter for that panel of the Board, not this one. The issue before the Board herein is whether, for purposes of determining any relief to which the Conference may be entitled, any of the five employees were employed and/or continued to be employed by the respondent in violation of the provincial agreement. Seen in that light then, the issue with respect to whether employees will be represented in collective bargaining in the ICI sector by the Conference and the Association will be determined under section 57(2) of the Act, one of its sections dealing with representation rights, as counsel for the employees argues it should be determined, and not by the windfall effects of section 137(2).

34. Section 137(2) of the Act was introduced into the Act for sound labour relations reasons; that is to promote stability in province-wide collective bargaining in the ICI sector of the construction industry. During the first round of province-wide bargaining in that sector in 1978 under the then new framework of *Bill 22 (The Labour Relations Amendment Act, 1977, S.O. 1977, c. 31)*, demands to extend bargaining rights from recognition in a specific local geographic area to province-wide emerged as a major bargaining objective of the trade unions. The difficulty experienced in 1978 in attempting to deal at the bargaining table with that issue threatened to disrupt the 1980 round of province-wide bargaining. That threat was eliminated by removing the issue from the table by means of the deemed recognition provisions of section 137(2) which took effect on and after May 1st, 1980 and its companion section 144 which requires an affiliated bargaining agent which is seeking to represent employees in the ICI sector to represent all of an employer's employees in that sector in the Province of Ontario. Section 137(2) states as follows:

Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a

designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights, 1979, c. 113, s.1.

It clearly contains no reference to the wishes of employees as counsel for the five employees correctly observed. Counsel for the Conference was equally correct in stating that neither the section nor any other section of the Act provides for any grace period before the deeming provision has its effect. None of which assists the Board in determining what effect the Legislature intended the section to have in the circumstances confronting the Board here.

35. While the Board does not agree with the argument of counsel for the employees and the respondent that the Legislature did not intend that the application of section 137(2) would accommodate the result sought by the Conference, the section is silent with respect to the rights, obligations and duties of employees. Therefore, in considering the application of section 137(2) of the fact situation herein, the Board must look to the Act as a whole, its purpose and the relationship of section 137(2) to any other section or sections of the Act which its operation brings into play. The Board should not decline to do so merely because it is functioning as an arbitrator. That fact does not deprive the Board either of the right or obligation to do so, rather, since the section clearly impinges on the provincial agreement with which the Board must deal, the Board has a duty to construe the Act. This seems particularly appropriate when the application of section 137(2) is the very reason why the Conference has bargaining rights on which to found its claim. The Courts have recognized the authority, and therefore the need of an arbitrator to apply a relevant statute when interpreting a collective agreement [*McLeod vs. Egan*, (1974) 46 D.L.R. (3d) 150 (S.C.C.)]. The Courts have also suggested that, when the Board is proceeding under section 124 of the Act, it can exercise its other powers under the Act [*Re International Association of Heat & Frost Insulators & Asbestos Workers Local 95 and Master Insulators Association of Ontario et al* (1980), 25 O.R. (2d) 8 (Divisional Court)]. Furthermore, in *The Ontario Erectors Association and Sheaffer - Townsend Limited v. International Union of Operating Engineers, Local 793*, an unreported judgment of the Supreme Court of Ontario (Divisional Court) which issued February 19th, 1980, the Court found that section 108 of the Act (then section 97), the so-called privative section, applies to the Board when it is sitting under the Act as an arbitrator. Finally, the Courts have instructed the Board that it should "... exercise any jurisdiction given to it under the Act, notwithstanding that a particular section of the Act is referred to in the formal application." (*Regina vs. Ontario Labour Relations Board ex parte Genaire Ltd.*, [1958] O.R. 637, a decision of the Ontario High Court).

36. Section 137(2) of the Act was proclaimed to be effective on May 1st, 1980. At that time all of the employees except Young were already employed by the respondent in Stratford, employment which was clearly outside of the geographic area in which Local 47 of the Conference held bargaining rights. Young was employed at Stratford in

September 1981, after the section was in effect but three or four months before the Conference first asserted its claim. Coincident with section 137(2) coming into effect, the bargaining rights held by Local 47 were extended by the section's deeming provisions to Local 473 in London; in other words, the respondent was deemed to have recognized Local 473, an affiliated bargaining agent, as the exclusive bargaining agent for its sheet metal worker employees in Stratford. The relevant words of section 137(2) provide that "... , the employer shall be deemed to have recognized all of the affiliated bargaining agents ... as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the *employees of the employer employed in the industrial, commercial or institutional sector of the construction industry...*" (emphasis added). The definition of a provincial agreement in clause e of section 137(1) of the Act employs the words "... , containing provisions respecting terms or conditions of employment or the rights, privileges or duties of ... the *employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry...*" (emphasis added). When the respondent was deemed on May 1st, 1980 to have recognized Local 473, they became bound to the provincial agreement by operation of section 145(4) of the Act which provides as follows:

After the 30th day of April, 1978, where an affiliated bargaining agent obtains bargaining rights through certification or voluntary recognition in respect of employees employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), *the employer, the affiliated bargaining agent, and the employees for whom the affiliated bargaining agent has obtained bargaining rights are bound by the provincial agreement made between an employee bargaining agency representing the affiliated bargaining agent and an employer bargaining agency representing a provincial unit of employers in which the employer would have been included.*

(emphasis added)

While section 145(4) refers to bargaining rights obtained either by certification or voluntary recognition it must be read to apply to bargaining rights born of the deeming provisions of section 137(2) because by the single stroke of the Legislative pen, an employer is placed in the same position as though it had voluntarily recognized the affiliated bargaining agents. Section 147(2) of the Act, which was in effect prior to May 1st, 1980, makes a provincial agreement binding upon, *inter alia* "... such employers, affiliated bargaining agents and employees as may be subsequently bound by the said agreement."

37. The two provincial agreements in question cover a provincial bargaining unit of sheet metal workers employed by the employers bound to those agreements. Section 137(1), 137(2), 145(4) and 147(2) all speak of employees represented by an affiliated bargaining agent and employed by an employer in the industrial, commercial and institutional sector of the construction industry. The consistent use of those terms in such closely connected sections of the Act compels the Board to the conclusion that, as of May 1st, 1980 when section 137(2) came into effect, the respondent's four sheet metal workers, Young excluded, being employees of an employer bound to the provincial

agreement, became employees in the bargaining unit of the provincial agreement and were bound to it. Young became an employee in the unit when he was hired in 1981 and became bound to the provincial agreement pursuant to section 147(2) of the Act.

38. One of the difficulties for the Board in dealing with the question of the status of the five employees arises from the fact that a question comes before the Board more than two years after the triggering event as a result of a grievance referral which itself was made twenty-one months after that event. The intervening acts and omissions of the parties operate to obscure the answer to the question. It is useful therefore to examine the question in the context of the relevant circumstances at the point in time when, by operation of statute, Local 473 became the exclusive bargaining agent for the respondent's employees. That was May 1st, 1980 when section 137(2) of the Act was given effect. On that date, in addition to Local 473 becoming the exclusive bargaining agent under the Act for four of the five sheet metal worker employees then employed by the respondent, Local 473, the respondent and those employees simultaneously became bound by operation of statute to the provincial agreement then in effect. One of Local 473's responsibilities under the provincial agreement was to oversee its application and administration within the Local's geographic jurisdiction. This responsibility includes insuring that the uniform conditions of the agreement were uniformly applied. This is the normal responsibility of any trade union which is a party to a collective agreement, but it becomes an even greater obligation for trade unions bound to provincial agreements because of the multiplicity of parties bound by them. Thus when a party or person within Local 473's geographic jurisdiction does not comply with the union security provisions in the provincial agreement, Local 473 is obligated to its own members and to all of the employees, employers and affiliated bargaining agents bound to the provincial agreement to enforce them. In that context then, if the respondent is employing employees who are not in compliance with Article 8 of the provincial agreement, Local 473 is within its rights to direct the respondent to discharge the employees and to bring a grievance if it fails to do so. The right of unions generally to seek such relief has been recognized by arbitrators who have issued compliance orders to that effect. See generally Brown, D.J.M. and Beatty, D.M., *Canadian Labour Arbitration*, (Agincourt, Ontario: Canadian Law Book Limited, 1977) at 62, 63 and 491.

39. Does this mean that Local 473, had it been aware of its bargaining rights on May 1st, 1980, would have been entitled to have this Board direct the immediate discharge of the four employees for non-compliance with Article 8 if it had filed a timely grievance to this effect? The answer to that question, in the Board's view, would depend on whether Local 473 had given them notice of their obligation and of the fact that it would be seeking their discharge if they did not satisfy the obligation. The entitlement to notice of the obligation and the reasonable opportunity to respond is implicit in the awards of arbitrators who have granted discharge as a relief for violation of union security provisions of a collective agreement. Generally arbitrators grant that relief only after satisfying themselves that the union has acquitted itself properly of any obligation and then they make the discharge conditional upon the employee failing to join the union within a specified time period. In other words discharge takes effect if employees fail to heed the notice that they are obligated to be members of the union and will be discharged if they fail to become members. In this respect see *Brown & Beatty*, *supra*, at page 491 and those cases cited therein at footnote 10.

40. This approach of arbitrators to violations of the union security provisions in collective agreements has developed largely in the context of industrial unions and with respect to collective agreements negotiated directly between an employer and the bargaining agent for its employees. Thus in that context arbitrators were dealing with union security provisions which had been arrived at by the mutual consent of the contracting parties directly affected by them. The context herein is one in which the parties affected, particularly the employees and their employer, find themselves bound on May 1st, 1980 by force of statute to the provincial agreement, a collective agreement in which they have had no voice in negotiating. The Board cannot accept that these employees would be entitled in such circumstances to any less consideration than arbitrators have given to employees bound by union security provisions arrived at by the mutual consent of their bargaining agent and their employer. Having regard to the overall scheme of the act, it is inconceivable that sections 137(1), 137(2), 145(4) and 147(2) could be seen to operate in a manner which would deny the respondent's employees reasonable notice of their obligation with respect to union membership and the opportunity to act on that notice and join the union if that is their decision. If they were given that opportunity and failed or refused to act on it to join the union, then the union would be entitled to demand that the respondent discharge them and in which case they would have to be dismissed.

41. What would constitute reasonable notice would depend on the facts in each situation and would in turn establish at what point the employees became obligated to apply for union membership. One of the principal difficulties arising out of the fact that, in this case, Local 473 held the exclusive bargaining rights with respect to these employees for 20 months without realizing it, is determining at what point the obligation of the five employees to apply for membership is triggered. Counsel for the Conference has contended that the employees' membership obligation became clear when the Board's March 17th decision confirmed that the provincial agreement applied to the respondent because that was the point at which it also became clear that Article 8 would apply to the employees and require them to be and remain members in good standing in one of the constituent locals of the Conference. There is no evidence that the union gave notice either to the employees or to the respondent. Sometime between the March 17th decision and April 26th, the respondent advised the employees that they should apply for membership in Local 473, so it is presumed that the respondent understood that the employees were obliged to join the union. The evidence does not tell us whether the respondent either knew or advised the employees that it might have to discharge them if they did not join. Even if the respondent had told them in unequivocal terms, there are a number of other grounds, in the Board's view, for the employees to question whether that was advice on which they must act. First, section 137(2) which conferred the bargaining rights on Local 473 speaks only of the obligation of the respondent to recognize the affiliated bargaining agents of the employee bargaining agency (i.e. the Association and the Conference). The Board's March 17th decision expressed uncertainty whether "... the applicant is under any requirement either to offer these employees membership or not to require the termination of their employment with the respondent." and further stated that the position of the employees could be raised when this matter was heard with respect to damages. Third, the Board has not previously dealt with the problem of employees caught by the extension of bargaining rights pursuant to section 137(2). These are grounds which would lead a reasonable

person to believe that he would have the opportunity to put his case to this Board and to have his status decided by it.

42. The Board is satisfied in these circumstances that the employees have not had proper notice of the full import of their obligations under Article 8, a notice to which they are entitled and, therefore they have had no opportunity to meet those obligations. This is not a case where their own conduct or that of the respondent would deprive them of the right to that notice and the opportunity to join the union. The employees were not employed as part of a scheme by the respondent to purposely circumvent either the provincial agreement or the bargaining rights of Local 473 of the Conference, as was the situation in *April Waterproofing Ltd.*, [1980] OLRB Rep. Nov. 1577, a decision on which counsel for the Conference relied in part in arguing for the discharge of the five employees.

43. The Board concludes in these circumstances that the logical point in time for determining when the obligation of the five employees to join the union starts with the issuing of this decision. In other words, the issuing of this decision is proper notice of their obligation and they are entitled to a reasonable period of time thereafter to meet that obligation. That reasonable time may be abbreviated, however, by the fact the February 11th hearing, the March 17th decision and the hearing before this panel of the Board have all served as warning signs to the employees that eventually they might have to meet such an obligation. Therefore the Board deems a reasonable period of notice to be five clear days, excluding Saturday and Sunday, from the date of issue of this decision.

44. Having regard for the foregoing circumstances, the Board directs that the respondent discharge David Davies, George Warnock, John Brennan, Mike Young and Brian Schade if they fail to make application to become members of Local 473 within five clear days, Saturday and Sunday excluded, from the date of issue of this decision and, after making application, fail to become members within the time limits reasonably determined by the union's constitution.

45. Since none of the employees had made application for membership before this matter came back on for hearing, the Board cannot agree with the contention of their counsel that the Conference is in violation of clauses (b) and (f) of section 46(2) of the Act by seeking their discharge. That section, however, would operate to prevent the Conference or Local 473 from seeking their discharge if membership was denied to or withheld from them for any of the reasons set out in clauses (c) through (g) of section 46(2). Should the employees be refused membership for any reasons which might not be protected by section 46(2), such reasons might be seen as a breach of the section 68 duty of fair representation, and that section would be an additional safeguard for the employees. Local 473 and the Conference bear that duty to all employees in the provincial agreement bargaining unit, but section 68 is not an automatic bar to either Local 473 or the Conference seeking to have the five employees discharged, regardless of their conduct, as argued by their counsel. Both Local 473 and the Conference have a duty to protect the provincial agreement, a duty which must be taken into account when construing and applying section 68 of the Act. The Board does not consider the circumstances of the case now before us, particularly the uncertainty surrounding the

consequences for employees caught by the application of section 137(2), to be cause for the Board to censure the conduct to date of Local 473 and the Conference with respect to their section 68 duty.

46. Having concluded that the Conference and Local 473 are not entitled to seek the discharge of the five employees until they have been given proper notice of their obligations and reasonable time to respond thereto, it is unnecessary for the Board to deal with the contention of counsel for the employees with respect to the *Canadian Charter of Rights and Freedoms*.

47. There remains only the issue related to the Conference's claim with respect to Industry Fund Contributions asserted on behalf of the Group. Clause 18 – Trust Funds of Appendix "D" of the provincial agreement provides in sub-clause 18.5 that an employers' industry fund be established; that contributions be remitted by separate cheque along with remittances to the Local 473 Welfare Plan for the same hours worked as are credited to the Welfare Plan; that the authorized collector of the Local 473 Welfare Plan will administer the fund for the London Sheet Metal Contractors Association and account for all contributions in a separate account known as The London Sheet Metal Contractors Association Industry Fund. Sub-clause 18.6 provides for a contribution rate of 15¢ per hour worked by all sheet metal workers and apprentices. The grievance seeks declaratory relief with respect to these contributions as well as damages for the respondent's failure or refusal to make the contributions. It is that assertion of claim which the Group is supporting. The primary beneficiary of a successful claim would be the London Sheet Metal Contractors Association. In the 1980 *Rivard* decision, *supra*, two employer associations had referred a grievance under section 124 asserting a claim against an employer bound to a provincial agreement who had failed to make contributions to an employers' industry fund as required by the agreement. The Board refused to hear the grievance because it was a claim between parties of like interest and, therefore, not a grievance as contemplated by section 124. The assertion of claim here is by the Conference against the respondent, clearly parties of opposite interests under the provincial agreement. The fact that the primary beneficiary of the claim, if it succeeds, would be an employers association does not alter that fact. The Board sees nothing in the provincial agreement nor in section 124 of the Act which would preclude the Conference from asserting the claim and this Board from hearing it.

48. One of the effects of the Board's decision that the five employees are entitled to notice of discharge and that this decision constitutes that notice is to remove any basis on which the Conference would be entitled to the *Blouin Drywall* type of damages which it is seeking because there would be no basis for awarding such damages. That does not foreclose the Conference from damages or other relief which would flow from violations of the provincial agreements other than the union security and hiring hall provisions. Those, however, are matters on which the parties have agreed to meet and attempt to reach agreement.

49. For all of the above reasons and having regard to the evidence before it, the Board determines pursuant to section 124 of the *Labour Relations Act* that:

- (a) Culliton Brothers Limited ("Culliton") has, by its failure to perform under the provincial agreement which expired April 30th, 1982 between the Ontario Sheet Metal and Air Handling Group ("the Group") and Sheet Metal Workers' International Association ("the Association") and Ontario Sheet Metal Workers' Conference ("the Conference") has violated that agreement and its Appendix "D" and by its failure to perform under the successor provincial agreement which expires April 30th, 1982, it has violated and continues to violate the provincial agreement;
- (b) Culliton forthwith shall cease and desist from continuing to violate the provincial agreement including its Appendix "D";
- (c) Culliton forthwith shall pay the proper hourly rates of pay, vacation and holiday pay, lost time pay and other premium rates of pay and allowances set forth in and required by the provincial agreement and its appendices;
- (d) Culliton shall discharge David Davies, George Warnock, John Brennan, Mike Young and Brian Schade if they fail to make application to become members of Local 473 within five clear days, Saturday and Sunday excluded, from the date of issue of this decision and after making application, fail to become members within the time limits reasonably determined by the union's constitution.
- (e) the parties to this referral shall meet and agree on the amount of damages, if any, owing to Local 473 or the Conference on their own behalf and on behalf of the members of the Conference's local unions and the London Sheet Metal Contractors Association resulting from Culliton's violations of the provincial agreements occurring on or after January 15th, 1982.

50. The Board remains seized of this matter in the event that the parties are unable to agree on the amount of damages owing or in the event of the disagreement arising with regard to the implementation of this Award.

DECISION OF BOARD MEMBER, W. H. WIGHTMAN;

Counsel for the five employees has raised an interesting issue; that is, whether the application of s. 137(2) of the *Labour Relations Act* in a manner which requires those employees to become members of Local 473 might violate the guarantee of freedom of association provided by section 2(d) of the *Canadian Charter of Rights and Freedoms*.

On first consideration, I feel it might not be an issue for this Board to determine but rather we should confine ourselves to making a finding within the terms of the *Labour Relations Act*. With that proviso, I concur with the Vice-Chairman's decision.

DECISION OF BOARD MEMBER, C. A. BALLENTINE;

1. I disagree that the five employees in question are in the bargaining unit and bound to the collective agreement. Until such time as they obtain membership and maintain that membership in accordance with the Provincial Collective Agreement of Local 473 and the Ontario Sheet Metal Conference, they are not represented by the applicant trade union. However, I agree that Local 473 has an obligation to accept the five employees into membership providing they are eligible for membership in accordance with the provisions of the Provincial Collective Agreement.

2. It is my position that the five employees are non-union employees, employed by the respondent company until they become members in good standing of the union, specified by article 8.1, the security clause of the collective agreement. These employees are not entitled to the benefits and conditions of the collective agreement, nor has the applicant union a duty to represent them until they become members in good standing as outlined in the collective agreement. The provincial agreement between the "Ontario Sheet Metal and Air Handling Group" and the "Sheet Metal Workers International Association and the Ontario Sheet Metal Workers' Conference" is a closed shop agreement as are all agreements in the construction industry under the provincial bargaining scheme. Section 46 of the Act allows for the construction industry to have such an operation.

3. Section 57(2) defines the bargaining unit of the existing collective agreement as follows, "*any of the employees in the bargaining unit defined in a collective agreement may*, subject to section 61 apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit". (emphasis added). It is clear from this section that the Legislature intended that employees in the bargaining unit, after a collective agreement is in force, are governed by the scope of the collective agreement. The scope of the applicable collective agreement between the above named parties is as follows. Article 2 – Definitions in this agreement 2.6 and 2.8 reads in part,

2.6 "employee" means a certified journeyman sheet metal worker or registered apprentice, *recognized* by the local union and employed in the shop or on the job site.

2.8 "member" means a certified journeyman sheet metal worker or apprentice, *recognized* by the local union and employed or eligible to be employed by an employer in the shop or on the job site.

Article 8 – Union Security

8.1 The employer agrees it shall be a condition of employment for all *employees* covered by the terms of this agreement to be a *member* of, and to maintain *membership* in good standing, in one of the local unions.

(emphasis added)

It is clear the five employees are not in the bargaining unit and are not bound by the provincial agreement until they become *recognized members and recognized employees* by the local union.

4. I am in conflict with the decision of the Board in regard to the interpretation of sections 137(1), 137(2), 145(1) and 147(2) as outlined in paragraphs 36 and 37. In paragraph 36 the Board treats the deeming provisions of section 137(2) as placing the employer in a voluntary recognition position as prescribed by section 145(4). The facts of this case are that the employer was bound by the certificate issued to Local 47 and by operation of 137(2). Local 473 obtained the bargaining rights for the employers' employees. There is no voluntary recognition whatsoever. All of the above named sections speak of the employees represented by an affiliated bargaining agent and employed by an employer bound by the provincial agreement in the industrial, commercial and institutional sector of the construction industry. The key words are *represented by an affiliated bargaining agent*. Therefore the affiliated bargaining agent does not and cannot represent employees until they become members in good standing according to the terms of the collective agreement.

5. There is a distinct difference between the union *obtaining bargaining rights* and the union *representing the employees* in the construction industry, because of the closed shop operation. A trade union in the ICI sector of the construction industry may gain bargaining rights either through certification or voluntary recognition providing it represents more than fifty-five per cent of the employees of the employer who have joined the union. The forty-five per cent who have not joined the union, at the time the union obtained the bargaining rights, may decide ultimately not to join the union and be *represented* by the bargaining agency. That would be their choice.

6. Although I agree in total with the directions of the Board contained in paragraph 49 as far as they go, I do not concur with paragraph 48 of the decision in regard to the declaration by the Board that the Conference would not be entitled to do the *Blouin Drywall* type of damages. The Board's direction in paragraph 26 is that January 15th, 1982 shall be the date from which relief, including damages shall be determined for any breaches of the collective agreement continuing after or occurring on or after that date. The company has continued to engage non-union employees in its employ since January 15th and therefore the applicant is entitled to claim damages in accordance with *Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America* (1973), 4 L.A.C. (2d) 254 (O'Shea) which made monetary award to a union on behalf of its members because of the employer's violation of the union security clause in the collective agreement. It is my position that the applicant is entitled to the *Blouin Drywall* type of damages.

1756-81-R The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local #58, Toronto, Applicant, v. **Harbourfront Corporation**, Respondent

Bargaining Unit – Trade Union Status – Applicant seeking unit restricted to audio-visual technicians – Seeking craft status – Board applying criteria and granting craft unit of all stage employees – Applicant refused certification in previous application – Discrimination against non-citizens basis for refusal – Board finding amendments to constitution since – Persons admitted to membership without regard to impugned eligibility requirements – Status granted

BEFORE: R. A. Furness, Vice-Chairman, and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *T. W. G. Pratt, P. W. Reed, James C. Fuller, William Hamilton, Steven McDonald, Konstantine Xenarios and Glenn Davidson for the applicant; R. M. Parry, Tom Falus and R. Browne for the respondent.*

DECISION OF THE BOARD; November 12, 1982

1. The applicant has applied for certification with respect to an alleged craft bargaining unit of employees. Before considering the appropriateness or inappropriateness of the bargaining unit described by the applicant, it is necessary for the Board to consider a preliminary matter which was raised by the respondent.

2. The respondent adopted the position that the Board was without jurisdiction to certify the applicant by virtue of the provisions of section 13 of the *Labour Relations Act*. Section 13 states:

The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

3. The respondent referred the Board to its decision in *Victor Productions Limited and Co.*, an unreported decision of the Board dated October 28, 1971, in Board File No. 0866-71-R. The applicant in the instant application had applied for certification in the *Victor* case and the Board dismissed the application for certification. In the *Victor* case, the Board stated in paragraphs 10 and 11:

10. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) [now section 1(1)(p)] of *The Labour Relations Act*. The Board also finds, however, on the basis of the evidence and having regard to the principles stated in *The Journal Publishing Company of Ottawa, Limited* case [1971] OLRB Rep. Dec. 925, that the applicant discriminates against persons because of race, nationality, ancestry or place of origin, contrary to the provisions of section 12 [now section 13] of the Act.

11. The Board is therefore unable to certify the applicant as bargaining agent and the application is accordingly dismissed.

4. In the *Victor* case, the Board referred to Article one, Section three and Article nineteen, Section two of the constitution of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (the "International") and to Article II, Section two of the constitution and by-laws of the applicant. At the time of the decision in the *Victor* case, these provisions read as follows:

Article One, Section three(in part)

The membership of this Alliance shall comprise the members in good standing of such local unions as shall hold a charter from this Alliance, and said affiliated local unions and such persons who, having been members of any local union which has had its charter revoked or suspended, shall retain their membership in this Alliance in the manner provided in these laws.

Eligibility for membership in this Alliance shall be restricted to Citizens of the United States of America, or Canada, or any territory in which the Alliance exercises jurisdiction, and when application is made in Canada, to any British subject. The foregoing requirement may be waived by the General Secretary-Treasurer, upon application of the local union involved where the facts in his judgment warrant it.

Article nineteen, Section two

Home Rule.

Home Rule is granted to all affiliated local unions of this Alliance and this shall be construed to confer upon each local union the authority to exercise full and complete control over its own affairs; provided, however, that no local union shall take any actions or adopt any laws which conflict with any portion of this Constitution and By-laws.

Article II, Section two

ARTICLE II.
Members

Sec. 2. No application for membership shall be received or no applicant shall be accepted into membership (except on transfer or withdrawal card) who has not been a bona fide resident of the jurisdiction of this union for a period of at least two years, preceding the making of such application. No applicant shall be admitted into membership who has failed to pass a satisfactory

examination as to his qualifications. No applicant shall be admitted into membership who has NOT been a member in good standing of whatever craft he has followed previous to date of his application (provided that there has been a local of the particular craft in his city). All applicants for membership must be twenty-one years or more of age at the time of admission into membership; he must be able to read, write and speak the English language, and be vouched for by at least four members who themselves have been members for at least two years, and who have worked with applicant in a legitimate theatre in this city or county.

5. In the *Victor* case, the Board heard evidence, from James Fuller, who was and still is, the president of the applicant. In its decision in the *Victor* case, the Board stated that Mr. Fuller had testified that the question of qualification by citizenship had never arisen with respect to applicants for membership. The Board concluded that the evidence fell short of proving, in the language of *The Journal Publishing Company of Ottawa Limited, supra*, that persons who were not Canadian citizens had in fact been admitted to membership notwithstanding the eligibility requirements of the constitution. The Board concluded that it was beyond dispute that the applicant had "not knowingly admitted such non-citizens into membership".

6. In the instant application, Mr. Fuller again gave evidence before the Board. He is a master electrician and has been a member of the applicant since 1944. Mr. Fuller has been president of the applicant for nineteen years and before that time was the business agent for ten years. There are approximately one hundred and fifty members in the applicant. He informed the Board that he is familiar with the procedure when the applicant receives applications for membership. Mr. Fuller testified that in considering applications for membership the applicant looks only at skills and qualifications, experience and whether the applicant for membership lives within the territorial jurisdiction of the applicant. He gave evidence that no one has been denied membership because of any of the matters referred to in section 13.

7. Mr. Fuller also introduced into evidence certain correspondence between the secretary of the applicant and the International during November and December of 1971 (shortly after the decision in the *Victor* case) in which the applicant adopted, and the International approved, the following amendment to Article II, Section one to eight of the constitution and by-laws of the applicant. The relevant portions of Article II read as follows:

Qualifications for Membership

No person shall be eligible [sic] either to membership or to retain membership in the local who shall be a member of any organization having for its aims or purpose the overthrow by force, of the Constitution and Government of the United States or Canada.

Section 1:- All Applicants for membership must be of legal age to engage in gainful occupation within the Province of Ontario.

Section 2:- Applications for membership must be in a written form and presented at a regular meeting of Local 58.

Section 3:- Every applicant for membership shall be required to pass a satisfactory examination in all Departments as to his competency and qualifications. Such examinations shall be before a Board of Examiners selected by this Union and the examination shall be uniform for all applicants.

Section 4:- The candidates elected as above shall be considered a member from the date of obligation and charged the usual dues and assessments and be entitled to a Union Card.

8. The International has approved this amendment to the applicant's constitution and by-laws and, in our view, must be taken to be satisfied that such amendment is not in conflict with any provision of the constitution and by-laws of the International. The applicant has amended Article II of its constitution and by-laws and has satisfied the Board that it has knowingly admitted to membership persons without regard to the eligibility requirements of either the constitution of the International or the constitution and by-laws of the applicant within the meaning of section 103(4) of the Act. The Board is therefore satisfied that it is not precluded from certifying the applicant by virtue of the provisions of section 13 of the Act.

9. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act.

10. The applicant has applied for certification with respect to a bargaining unit of "all stage employees, theatre technicians, audio-visual technicians and equipment operators, stage hands and stage electricians employed by the respondent at its premises in Metropolitan Toronto".

11. The respondent amended the description of the bargaining unit that it believed to be appropriate for collective bargaining to read "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period".

12. The origins of the respondent began in 1972, when the Federal Government announced that it would acquire the lands which are presently known as Harbourfront. The Federal Government announced it would acquire properties and buildings and turn them over to the citizens of Toronto for a park. Between 1972 and 1974, the Federal Government acquired the various properties. In the period between 1972 and 1974, there was considerable discussion as to what should happen to these properties and what function they should really serve for the citizens of Toronto. By the middle of 1976, it was decided by the Federal Government that the concept of Harbourfront should be handled by a locally-run organization. The Federal Government caused the respondent to be chartered as a company in Ontario in which all of the shares are owned by Her Majesty the Queen in Right of Canada. Under this company a board was established and

was given the mandate to produce a plan which would be both acceptable to interested parties in Metropolitan Toronto and also the Federal Government. In 1978, this board arrived at the conclusion that with a new management the objectives of the respondent could be achieved. These objectives were to develop Harbourfront as Toronto's central urban waterfront; to preserve and develop Harbourfront as a public place; to develop Harbourfront in ways that account for its special location, conditions and history; and to achieve financial self-sufficiency through proper organization and management of Harbourfront's lands.

13. At the present time the respondent consists of four divisions. These divisions are programming (which contains the audio-visual aspects of the operation), communications, property and administration, and planning and development.

14. The mandate of the programming division is to provide to the public of Metropolitan Toronto and to tourists the broadest possible range of public activity and encompassing entertainment and education. The various aspects of the programming include performing arts, visual arts, recreation, film, education, marine activities, literary services, and numerous special activities, such as Caravan, Caribana, and Canada week. In order to promote and stage these various activities, the respondent draws upon the audio-visual technicians who are the subject of this application for certification. These various functions require audio-visual technicians plus the various equipment which is used to stage the functions. The marine activities require audio-visual equipment for a lecture, or a film, or a seminar. The educational aspects feature teachers' conferences or a children's theatre. The visual arts require a 16mm film projector, or slides, or lighting. The performing arts deal with live performances and require the assistance of lighting and sound to stage the events. Films require a 16mm projector, and the literary series requires sound and lighting in order to stage the readings.

15. The performing arts use audio-visual technicians more than any other single group, and the community activities and special events, such as Canada week, are the next heaviest user of the talents of the audio-visual technicians. The programming staff either initiate an idea or are approached by an organization or group which wishes to present a programme. If the idea fits into the general outlines of the programming, then the idea would be fleshed out and discussed at the weekly meetings which are attended by Robert Browne, the manager of the York Quai Department, or his assistant manager. Such meetings are usually attended by an audio-visual technician.

16. The employees in the property department do not usually work on the stage. However, the heavy work of moving, for example, pianos and organs, on to the stage is performed by the caretakers and shift supervisors who are under the supervision of Mr. Browne. The employees of the audio-visual department are primarily relied upon to provide lighting and sound techniques in the respondent's spaces. The respondent depends upon their expertise for the staging of the events which are presented to the public. There are minor variations in the moving and placing of a piano or organ on the stage, when an artist may request an audio-visual technician to site the instrument on the stage. Any consultations by the artist or producer which involve lighting or sound would not be made with the caretakers but would be made with the audio-visual

technicians. While the visual arts department or art gallery does its own lighting design, these lights consist of track lights which may be focussed or coloured. However, these lights are not controlled by a board or panel. Where changes in the lighting are required in the art gallery, the curator of the gallery consults outside consultants.

17. Victor Svenningson is the audio-visual co-ordinator and reports to Mr. Browne. Mr. Svenningson usually attends the weekly meetings on the programme. He is responsible for the co-ordination of the work of the audio-visual technicians. While his job description uses the word "supervise", his responsibilities as revealed through the evidence of the audio-visual technicians establishes that he is employed essentially in a capacity analogous to a lead hand. Mr. Svenningson has no right to hire, dismiss or discipline employees. Specific requests for time off by the audio-visual technicians must be referred to Mr. Browne and not Mr. Svenningson. In considering all of the evidence before it, the Board finds that Victor Svenningson does not exercise either sufficient independent discretion or supervisory authority so as to cause the Board to find that he exercises managerial authority within the meaning of section 1(3)(b) of the Act.

18. Stephen O'Connor has been employed by the respondent since January of 1980. His primary responsibility is as a stage electrician, or, expressed differently, as an assistant electrician or soundman. Mr. O'Connor described the three main theatres (often referred to as "spaces") of the respondent as, the Proscenium Theatre (also referred to as the Studio Theatre), the Briganteen Room and the Amsterdam Cafe. He spends most of his time in the Studio Theatre which has a seating capacity of one hundred and ninety-six. The stage is twenty feet deep and twenty-six feet wide and is equipped with twenty ellipsoidal reflector spotlights, twenty-five spotlights with big beam spreads, twenty-four solid state dimmers, and various control consoles. The sound equipment consists of one reel to reel tape recorder in an eight-channel microphone mixer, two amplifiers and smaller peripheral equipment. The Studio Theatre does not have a fly system (that is to say, a system of where the scenery moves up and down by a series of weights, ropes or steel cable). However, the Studio Theatre is suitable for modern dance, classical dance (ballet), opera, musicals, drama, children's puppet theatre and films.

19. Mr. O'Connor hangs and focusses stage lighting equipment, connects equipment to dimmers, plugs into lit circuits, points and focusses the lighting with the use of filters and operates a three set control desk. He uses cue sheets and on occasions operates a 16mm projector for films.

20. Mr. O'Connor described the Briganteen Room as a flexible space where the stage may be any where in the room. The seating capacity is four hundred and the size of the stage is about five thousand square feet. This space may be used for space and is equipped with ellipsoidal reflector spotlights, spotlights with big beam spreads and solid state dimmers. The sound equipment consists of various multi-channel mixers, amplifying speakers and microphones. The Briganteen Room is equipped with curtains which may be positioned in various locations. Mr. O'Connor performs the same work in the Briganteen Room as he does in the Studio Theatre. He described the Amsterdam Cafe as a restaurant with a small stage which measures twenty-four feet by sixteen feet. The stage lighting is fixed and consists of a parabolic reflector. There is also sound

equipment, a radio system and a cassette deck in the restaurant. This stage is used for cabaret, pageants, fashion shows, carnival events, ballroom dancing under the Stars and jazz concerts.

21. There is another facility on the east side of the respondent's premises known as Urban Square. This facility is a large tent with a stage of about three hundred square feet and a seating capacity of between five hundred and six hundred. During each summer dimmers and an eight-channel sound system are installed once the system of pipes and cables are in place.

22. Mr. O'Connor initially receives a booking form from the programming department. The booking form indicates which user group is to use a particular theatre. About three to four weeks before a scheduled event he sets up a production group and answers any questions about lighting and the availability of equipment and generally provides expertise to the user group – both professional and amateur. Mr. O'Connor prepares a plan of the lighting for the production. He is responsible to Robert Browne, the manager, who in turn is responsible to Thomas Falus, the director of property and administration. Whenever chairs are to be provided for the audience they are set up by a crew from the property department. Similar crews from the property department move the movable stages under the direction of the user group in consultation with the audio-visual technicians, clean between the seats after performances and may set up awnings and attach support cables.

23. Mr. O'Connor commenced studying theatre arts in high school where he met the head electrician at Hart House who is a member of the applicant. Mr. O'Connor was encouraged to work as a student at the Hart House Theatre by the head electrician and received training as an apprentice electrician and as a stage carpenter. Subsequently, he attended Ryerson Polytechnical Institute and studied the theatre technical course for one and a half years. These courses included technical theatre, physics, mechanics, terminology and arts and crafts. Mr. O'Connor engaged in freelance work in Toronto, including work for the respondent. He is neither a licensed electrician nor a journeyman carpenter or journeyman electrician. While his electrical work for the respondent is not supervised by an electrician, an electrician hooks up the cables after Mr. O'Connor has run the cables. The performing arts department meets with user groups before any meeting is set up between the user groups and Mr. O'Connor.

24. Steven McDonald is employed by the respondent as an audio-visual technician and commenced his employment in September of 1980. He works mainly in the Briganteen Room where he works with show groups with respect to lighting and sound to provide the best possible shows. He is contacted by the groups one to four weeks before the public performance and discusses their lighting needs. The groups then return to Mr. McDonald with a lighting plan. When a group arrives on the respondent's premises he assists the members of the group to hang the lights and he also assists them in the design of the lighting plan. Essentially, Mr. McDonald works with the technical director of the group. The largest proportion of his work is with dance groups, musical groups, readings and sailing seminars. In addition to working in the Briganteen Room, he works on outdoor facilities known as the Shipdeck Stage and the Opera Tent. Mr. McDonald works on productions in the Amsterdam Cafe and in the Studio Theatre.

25. While Mr. McDonald takes directions from Robert Browne, he testified that he really knows what his skills are and in working from a schedule he knows what to do and pretty well works independently. His hours of work vary according to the needs of each production. However, he tries to conform to forty hours each week. Mr. McDonald is paid on a salary basis and while at times his work extends beyond a seven-day week, he tries to conform to a five-day week, including work on Saturdays and Sundays. He also performs maintenance work and describes his work as not being different from the work of Stephen O'Connor.

26. Mr. McDonald's qualifications originated in 1971, when he first started working professionally in the theatre in Edinburgh, Scotland. At that time he worked as assistant stage manager until 1972. He then moved to the Roundhouse Theatre at Chalk Farm in London, England, where he worked as an assistant electrician. His responsibilities at the Roundhouse Theatre were to handle the lights for shows that were tryouts for the West End or for touring shows. This involved the operation of the lighting board. Mr. McDonald left this position in the middle of 1974 in order to work independently. During the next two years he worked as the lighting director for a rock band. This work involved six European tours and two North American tours. In 1976, he returned to Canada and served as the lighting director for the Olympic Village in Montreal. During the latter part of 1976, he worked as an electrician for the Toronto Dance Theatre. In 1977 Mr. McDonald continued his formal education at Seneca College where he successfully completed a course in electronics in 1978. Thereafter he worked for a few months for a manufacturer of electronics as a bench technician and then returned to the Toronto Dance Theatre as an electrician for a year and a half. Upon leaving the Toronto Dance Theatre, Mr. McDonald commenced his employment with the respondent.

27. Mr. McDonald works in the Studio Theatre and is involved in theatrical and dance performances, children's shows, opera, music, readings, films and sailing seminars. The number of hours which he works each day varies considerably. A typical work week may be considered as commencing on Wednesday. On that day he works between 9:00 a.m. and 5:00 p.m. and prepares the stage or space for a production which is due to open on the following day. On Thursday he arrives at about 8:30 a.m. and will go to the Briganteen Room and see if the arrangement of the chairs and platform has commenced. At 9:00 a.m. the director and technical director of the visiting group arrive and meet Mr. McDonald. At about 10:00 a.m. the three of them will work on focussing the lights, laying the dance floor and installing a sound system for the evening performance. After a lunch break from 1:00 p.m. to 2:00 p.m., Mr. McDonald will be involved in cueing and dress rehearsals for the performance that evening. After a dinner break from 6:00 p.m. to 7:00 p.m., Mr. McDonald will be engaged until 7:30 p.m. in small cleanup work and adjustments before the doors are opened to the public. Between 8:00 p.m. and 10:00 p.m. he will be engaged in the participation and running of the show by operating the sound and lights. Mr. McDonald usually ceases work at about 10:30 p.m. On Friday and Saturday he arrives for work at about 6:00 p.m. and leaves at the conclusion of the performance at about 10:30 p.m. On Sundays he will usually arrive for work before 6:00 p.m. and will be engaged until approximately midnight in packing away the respondent's equipment. Usually Monday and Tuesday are Mr. McDonald's days off work.

28. Mr. McDonald gave evidence that while the personnel in the property department set up the chairs for the audience and may on occasions set up the stage for events, such personnel are not engaged in the production of shows.

29. Glenn Davidson is employed by the respondent as an audio-visual technician. In June of 1981, he was employed on a part-time basis and in October of 1981, was employed on a full-time basis. While his duties are virtually the same as Steven McDonald and Konstantine Xenarios, his work week is probably the most variable. Mr. Davidson works from Monday to Friday and does the children's shows in the Briganteen Room where his schedule could be the same as Steven McDonald or Stephen O'Connor. When Mr. Davidson is working on a show he does not work under anyone's supervision. On occasions he performs maintenance for the show which are staged by the respondent.

30. Mr. Davidson's qualifications include a degree in Theatre from the University of Ottawa and included courses in technical theatre and design. He has had experience as an actor, an electrician, a stage manager, in property and lighting and set design. Upon graduation he was the technical director for a modern dance group in Ottawa for their 1979-80 season. In September of 1980, Mr. Davidson commenced an engagement of five months as the technical director of the Phoenix Theatre in Toronto.

31. Konstantine Xenarios is employed by the respondent as an audio-visual technician and works under the direction of Robert Browne and Victor Svenningson. He has been employed at Harbourfront since July of 1979. Mr. Xenarios' duties consist of the setting up, operation and striking (dismantling) of sound equipment and lighting. In addition, he operates the 16mm projector for films. He does not work solely in any particular theatre and spends about sixty per cent of his time operating the projector in the Studio Theatre. The remainder of his time is evenly divided between the other spaces and is spent in operating sound equipment and lighting. Mr. Xenarios normally works forty hours each week with Monday, Tuesday and Wednesday evenings spent in showing films. During the day and evening on Saturday and Sunday, he is engaged in operating sound equipment and lighting. Mr. Xenarios is a Greek citizen and a member of the applicant and his previous relevant experience consists of seven months as an audio-visual assistant for the respondent in 1977 and three months as a technician and broadcast announcer on a radio station in Greece.

32. The applicant filed a number of collective agreements. These collective agreements were between the applicant and the following employers:

1. Hart House
2. Massey Hall
3. The Canadian Broadcasting Corporation
4. Ed Mirvish Enterprises Limited operating the Royal Alexander Theatre

5. Maple Leaf Gardens
6. O'Keefe Centre
7. The Canadian National Exhibition
8. The Board of Management of The St. Lawrence Centre for the Arts, and
9. CP Hotels Limited operating The Royal York Hotel.

33. The classifications referred to in these collective agreements cover a wide variety of jobs such as, electricians, carpenters, special operators, flymen, stagehands, switchboard operators, follow spot operators and house sound systems, property men, front light operators, public address operators, portable switchboard operators, chief sound technicians, chief grips, property masters, operators and assistants, spotlight operators, superintendents of construction of stage settings and soundmen. The descriptions in the bargaining units in these collective agreements also vary, with the terse "all stage employees" for the collective agreement between the applicant and CP Hotels Limited operating The Royal York Hotel and "electricians, carpenters, special operators and flymen" for the collective agreement between the applicant and Hart House. On the other hand, the collective agreements between the applicant and Maple Leaf Gardens and between the applicant and The Canadian National Exhibition set forth the classifications of employees in considerable detail.

34. All of the classifications referred to in the preceding paragraph are not present in each of these collective agreements. No doubt this is a function of the productions and art forms which are variously produced by or for the employers who are parties to these collective agreements. Typically, the areas of craft trade unionism which the Board encounters are mainly in the construction industry and to a lesser extent in the printing and allied trades industry. The description of the craft bargaining units in the construction industry tends to follow a repetitive pattern with very little variation, such as, for example, millwrights and millwrights' apprentices or electricians and electricians' apprentices. In the printing and allied trades industry the craft bargaining units do not always follow repetitive patterns with very little variation and show more variations in the composition of the bargaining units than in the construction industry. While the construction industry and the printing and allied trades industry are by far the largest groupings of craft trade unionism which generally fall within provincial jurisdiction, there are nevertheless other smaller pockets of craft trade unionism such as, for example, butcher workmen, stationary engineers, fur workers and bar employees. The Board has generally had little contact with the applicant which asserted its claim to the status of a craft trade union. The respondent did not dispute that the applicant is a craft trade union. On the basis of the evidence and representations before it, the Board finds that the applicant is a craft trade union as contemplated by the provisions of section 6(3) of the Act. The question of whether the applicant is entitled to be certified by the Board for the bargaining unit referred to in paragraph ten depends upon whether the applicant is able to establish that all of the conditions set forth in section 6(3) have been met in the circumstances of this application.

35. The applicant is seeking certification with respect to a craft bargaining unit. The circumstances under which craft bargaining units are deemed to be appropriate are set forth in section 6(3) which provides:

Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

The Board has emphasized that three conditions are to be met in order for the craft bargaining unit to be appropriate. See *Art Wire & Iron Co. Ltd.*, 54 CLLC ¶17,080. Each of the following conditions has to be satisfied:

- (1) the group of employees concerned exercise technical skills or are members of a craft by reason of which they are distinguishable from other employees;
- (2) the group of employees concerned commonly bargain separately and apart from the other employees through a trade union that, according to established trade union practice pertains to such skills or crafts;
- (3) the application for certification is made by a trade union pertaining to such skills.

36. The respondent sought to minimize the skills exercised by the audio-visual technicians. While it is true that there is a spread of skills and training among the audio-visual technicians, the Board has often stated that the nature of the technical skills exercised, while an important factor, is not the governing factor, and, that the extent or degree of exercise of the technical skills is not determinative, provided such technical skills are sufficiently used to distinguish the jobs from others. See *Cooper and Beatty Limited*, 58 CLLC ¶18,100; and *Commercial Papers Limited*, [1969] OLRB Rep. Nov. 939.

37. While the Board appreciates that technical skills for a given craft may vary and change over the years (the technical skills of bar employees, for example), we do not minimize the skills of the audio-visual technicians. Their work for the respondent, in our view, calls for a blend of creativity and artistic judgment in the setting of the technical requirements of lighting and sound. In addition, upon reviewing the collective agreements which have been filed with the Board, we are satisfied with respect to the

less skilled audio-visual technicians that, pursuant to section 6(3), the Board may include in any craft bargaining unit persons who according to established trade union practice are included in their work and bargaining with the more skilled audio-visual technicians.

38. The Board is satisfied that the audio-visual technicians exercise technical skills by reason of which they are distinguishable from other employees and in doing so rejects the argument of the respondent that the caretakers are analogous to propertymen and should therefore be included in the bargaining unit. The evidence of Mr. Fuller on the duties of propertymen in general and the limited evidence with respect to the respondent's caretakers does not satisfy the Board that propertymen and caretakers are analogous or equivalent and that the respondent's caretakers ought to be included in an appropriate bargaining unit under section 6(3). The Board is also satisfied that the audio-visual technicians commonly bargain separately and apart from other employees through the applicant and that the applicant according to established trade union practice pertains to their skills. The Board is also satisfied that this application for certification has been made by the applicant which is a trade union which pertains to such skills. The respondent pointed out that previously the United Garment Workers of America had unsuccessfully applied for certification for an "all employee" bargaining unit. See Board File No. 0441-79-R. The fact that one bargaining unit may be appropriate under section 6(1) does not, in itself, prevent a portion of a respondent's employees from potentially constituting an appropriate unit under section 6(3). This state of affairs of craft units either being represented separately or included as part of a larger "all employee" bargaining unit is frequently found with respect to stationary engineers, butcher workmen and bar employees.

39. The description of the appropriate bargaining unit pursuant to section 6(3) requires a consideration of the present employees who are to be included in such a bargaining unit. All of the respondent's employees who are the subject of this application have been described as audio-visual technicians and the applicant has not taken any exception to this description. In the circumstances of this application, the Board believes that a description of all stage employees with a clarity note that the bargaining unit presently comprises audio-visual technicians is appropriate. In the event that the respondent subsequently employs other stage employees, then such employees may form an accretion to the bargaining unit. The evidence established that the respondent does have a history of employing students and part-time employees. The lowest level of management exclusion appears to be Mr. Browne, who is classified by the respondent as a manager.

40. Having regard to the foregoing, the Board further finds, pursuant to section 6(3), that all stage employees of the respondent in Metropolitan Toronto, save and except manager, persons above the rank of manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

41. For the purpose of clarity, the Board notes and declares that the bargaining unit presently consists of audio-visual technicians.

42. The employees who are included in the bargaining unit for the purpose of the count consist of:

Glen Davidson
Robert De Brun
Steven McDonald
Stephen O'Connor
Victor Svenningson
Konstantine Xenarios.

The applicant filed evidence of membership of the type indicated at the hearing on behalf of three of these six persons.

43. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 23, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

44. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

45. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

46. The matter is referred to the Registrar.

1262-82-R United Food and Commerical Workers International Union, Local 633, Applicant, v. **Huntsville IGA**, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Applicant seeking unit restricted to all full-time meat dept. employees – Board considering bargaining history of applicant – Granting unit sought – Discussion of appropriate units in retail food industry

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: Douglas J. Wray, Frank Kelly and John Hurley for the applicant; D. Jane Forbes-Roberts, M. Taylor and S. Beatty for the respondent; Donald Stickland and Doug Thompson for the objectors.

DECISION OF THE BOARD; November 17, 1982

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The applicant, Local 633, has applied to represent “all meat department employees of the respondent in its stores in Huntsville, Ontario save and except persons regularly employed for not more than twenty-four hours per week”. Counsel for the respondent objects to the appropriateness of this bargaining unit and maintains that the unit should be an “all employee” bargaining unit and include the respondent’s other employees as well. We note that in a related application (File No. 1261-82-R) Local 175 of the same union has applied to represent all the respondent’s employees save and except, among others, the full time meat department employees.
4. The Board has reviewed the material submitted to it by the parties both at and subsequent to the Board’s hearing. The Board is fully satisfied that a unit of full-time meat department employees is an appropriate unit for Local 633. In *Ontario Food Division (Food City) of the Oshawa Group Limited*, [1978] OLRB Rep. Sept. 826 where a similar argument was raised by the respondent, the Board made the following observations at pp. 827–828 of its decision.

The applicant [Local 633] is seeking certification with respect to a bargaining unit of “all meat department employees of the respondent in its stores in the Municipality of Niagara Falls, save and except persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period”. The respondent has adopted the position that the appropriate bargaining unit is “all employees of the respondent in its Niagara Falls Food City Store, in the Municipality of Niagara Falls, save and except the store manager, department managers, office staff and persons regularly employed for not more than twenty-four

hours per week and students employed during the school vacation periods”.

The respondent argues that the all employee unit is more appropriate because all employees are paid by hourly wage and receive the same benefits. The respondent also alleges that there is an ongoing interchange between its various departments (including the meat department). The respondent points out that the store is managed as one unit. When questioned about the nature of the ongoing interchange, the respondent conceded that there would be a minimum of interchange with respect to the meat cutter and that the meat wrapper would be more frequently engaged in interchange between departments.

As early as 1962, the Board made the following observations in the *London Food City* case, [1962] OLRB Rep. August. p. 151-2:

The applicant [Local 633] has applied to be certified as bargaining agent for all meat department employees of the respondent in its store in Westminster Township. The respondent employs in its meat department three full time employees and four persons employed for not more than 24 hours per week.

The Board has inquired into the history of applications made by, and the collective agreements entered into with, the Amalgamated Meat Cutters and Butcher Workmen of North America with respect to supermarket employees.

It appears from the Board's records that the Amalgamated Meat Cutters and Butcher Workmen of North America has consistently applied for three separate and distinct bargaining units in supermarkets and accordingly has bargained for three separate bargaining units which may generally be described as follows:

- (a) all employees in the meat department, save and except persons employed for not more than 24 hours per week and students hired for the school vacation period.
- (b) all employees in the store, save and except the meat department employees, persons regularly employed for not more than 24 hours per week, students hired for the school vacation period and persons exercising managerial functions.
- (c) all employees in the store employed for not more than 24 hours per week and students hired for the school vacation period.

In that case the Board certified Local 633 of the Amalgamated Meat Cutters and Butcher Workmen of North America as the bargaining

agent of “all employees of London Food City in the meat department of its stores in Westminster Township, save and except persons employed for not more than 24 hours per week and students hired for the school vacation period”. The Board also noted that in view of the foregoing, part-time employees of London Food City in its meat department do not constitute an appropriate bargaining unit and that it would not be appropriate to include them in the bargaining unit which had been found to be appropriate.

The Board has regularly followed this pattern of appropriate bargaining units in retail food outlets. The decision of the Board in the *L & W Distributors Ltd. carrying on business as N & D Supermarket* case, [1970] OLRB Rep. Feb. pp. 1343, 1344, dismissed an application for certification with respect to a unit of all meat department employees regularly employed for not more than twenty-four hours week and students employed during the school vacation period and relied upon the *London Food City* case *supra*. However, the Board in that case went on to make certain observations with respect to craft units. It is clear that these observations must be regarded as *obiter dictum* and were based, as the Board stated, on the particular circumstances of that application. There is no indication of the particular circumstances of that application.

The respondent relied upon the *Inland Publishing Co. Limited* case, [1969] OLRB Rep. March, p. 1341. This case states that the Board’s usual policy is not to exclude “24 hour people” or students from a craft unit. As a general proposition it correctly describes the Board’s policy with respect to crafts units. *The applicant, however, has a long history of bargaining for units of employees in meat departments which exclude persons who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period(s). In the circumstances of this application there is nothing to indicate that the bargaining unit set forth in the application is inappropriate for collective bargaining. . . .*

[emphasis added]

Having stated its opinion that there was nothing to indicate that the bargaining unit of all full-time employees in the meat department applied for by the applicant in the *Food City* case was inappropriate, the Board appointed an Officer to inquire into and report to the Board on, among other matters, the degree of interchange, if any, between the employees in the meat department of Food City and the respondent’s other employees. On the basis of the report submitted the Board concluded that there was a negligible amount of interchange between the employees in the meat department and other employees of the respondent. Accordingly, by a further decision dated November 23, 1978 (file no. 0552-78-R) the Board found that the unit of all full time meat department employees of the respondent applied for by Local 633 was appropriate and issued a certificate to the applicant for that unit.

5. In the instant matter the respondent does not base its objection to the unit applied for by Local 633 on any alleged degree of interchange between the full-time meat department employees and the other employees of Huntsville IGA. Instead, counsel for the respondent maintains that a unit of meat department employees offends the Board's policy favouring "all employees" units.

6. As noted in the *Food City* decision, however, the applicant, Local 633, has a long history of bargaining for full-time employees in meat departments which, contrary to the suggestion of the respondent, has not been interrupted by the Board in more recent years. In *National Grocers Co. Ltd.*, (file no. 2400-80-R, decision dated March 4, 1981), the Board, on the agreement of the parties, certified Local 633 for all full-time meat department employees of the respondent in the Municipality of St. Catharines. Through a parallel decision issued the same day (file No. 2399-80-R) the Board certified Local 175 of the United Food and Commercial Workers International Union for all employees of the respondent in its stores in the Municipality of St. Catharines, save and except meat department employees covered by the certificate issued in file no. 2400-80-R. As well, in *Thorold IGA Market* (file no. 1372-80-R, decision dated March 19, 1981) the Board certified Local 633 for a bargaining unit of all full-time meat department employees of the respondent in Thorold, Ontario. In a related application, the Board in *Thorold IGA Market*, [1981] OLRB Rep. June 791, certified Local 175 for all the rest of the full-time employees.

7. It is readily apparent to the Board that Local 633 of the Canadian Food and Allied Workers Union has a consistent and uninterrupted history of bargaining for full-time meat department employees and that Local 175 of the same union has a consistent and uninterrupted history of bargaining for the other employees, that is, full-time non-meat department employees, part-time employees including part-time meat department employees and students employed during the school vacation period.

8. Having regard to the bargaining history of Local 633 the Board finds that all meat department employees of the respondent in its stores in Huntsville, Ontario, save and except persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. In accordance with the Rules of Practice respecting applications for certification, the respondent employer filed a list of employees in the bargaining unit, together with specimen signatures for the employees on that list. Having regard to the list filed by the employer, and the finding of the Board with respect to the bargaining unit description, the Board is satisfied that there were 4 employees in the unit, at the time the application was made.

10. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards, which consist of combination applications for membership and receipts. The union filed 6 cards, 3 of which coincide with the names of employees in the bargaining unit. The membership cards are signed by the employees, and the receipts are countersigned and indicated that a payment of one dollar has been made within the six month period immediately preceding the terminal date of this application. The money was collected by more than one person and

the membership evidence is supported by a duly completed Form 9, Declaration Concerning Membership Documents.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on October 19th, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under Section 8(1) of the said Act.

12. A statement of desire in opposition to an application for certification for employees of the respondent was filed with the Board. No employees in this bargaining unit, however, signed both a membership card and the statement of desire. Accordingly, the statement of desire is not relevant because even if it was shown to be voluntary it would not cause the Board to exercise its discretion and order the taking of a representation vote.

13. A certificate will issue to the applicant.

0918-82-R Energy and Chemical Workers Union CLC, Applicant, v. **Indusmin Limited**, Respondent, v. United Cement Lime Gypsum and Allied Workers International Union A.F.L.-C.I.O. C.L.C., Intervener

Practice and Procedure - Pre-Hearing Vote - Incumbent union suggesting possibility of loss of jobs if applicant successful - Applicant Union losing vote requesting new vote - Statements not seriously misleading voters - Within permitted bounds of electioneering - No new vote directed

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members B. K. Lee and E. J. Brady.

APPEARANCES: *Chris G. Paliare, Tania Wacyk and Don Burshaw for the applicant; N. McL. Rogers, Q.C. and Gaston Berube for the respondent; Naomi Duguid, Ed Mattocks and Wayne Moore for the intervener.*

DECISION OF THE BOARD: November 30, 1982

1. This is an application for certification which was filed on August 13, 1982.

2. By a previous decision of the Board dated August 30, 1982, a pre-hearing representation vote was ordered to be taken of the employees of the respondent in the following agreed voting constituency:

All employees of Indusmin Limited at its mine and plant at Nephton, Ontario save and except officers of the company; management

personnel; supervisors, foremen, hourly rated employees above the rank of working sub-foreman; secretary to mine manager, draftsmen, surveyors; janitors and watchmen, and employees who have less than thirty (30) days of service or two hundred and forty (240) hours worked, whichever comes first, with the company.

This was also the bargaining unit contained in the October 12, 1980 – October 11, 1982 collective agreement between the intervener and the respondent. By the Board's direction, the voters were to be given a choice between the applicant and the intervener.

3. A vote was held on September 9, 1982 and the results revealed to the parties on the same day showed that of 103 individuals casting ballots, 49 marked their ballots in favour of the applicant and 54 marked their ballots in favour of the intervener.

4. Within the time limits set out in form 71 – NOTICE OF REPORT OF RETURNING OFFICER WHERE PRE-HEARING VOTE HAS BEEN HELD the applicant made certain allegations regarding the conduct of the intervener and its supporters prior to the vote. On the basis of these allegations the applicant requested that the representation vote held on September 9, 1982 be set aside and that a new vote be ordered by the Board pursuant to section 103(5) of the *Labour Relations Act*. A hearing was held for the purpose of hearing the evidence and representations of the parties with respect to these allegations.

5. While initially the applicant's allegations related to two incidents, namely;

- (a) the use of a company vehicle to drive employees to the polling station and
- (b) dissemination of misleading information,

the applicant only called evidence with regard to the second incident.

6. It is undisputed that Mr. Wayne Moore, President of the intervener, spoke to approximately 25 employees of the respondent at a regular meeting of the intervener on Thursday, September 2, 1982 at or around 7p.m. The stated purpose of the meeting was to discuss the counterproposals received from the respondent. However, prior to discussing them, Mr. Moore spoke to the gathered employees about the scope clause set out in the respondent's Reply to the Instant Application. He told the gathering that he had obtained a copy of the Reply from a Mr. Mattocks, District Representative of the intervener. He handed out three copies of the Reply for the gathering to see and read its contents aloud as well. He drew their attention to paragraph 5 of the Reply which described the appropriate bargaining unit to be:

Employees of Indusmin at its Quarry and Plant at the Nephton's Nepheline Syenite Division save and except:

- a. Office, clerical and technical employees
- b. Supervisors including employees above the rank of working sub-foreman

- c. Sales and customer service personnel
- d. Janitors, watchmen, students and probationary employees
- e. Persons covered by subsisting labour agreements.

The difference between this bargaining unit description and the bargaining unit described in the then subsisting collective agreement between the respondent and the intervener is the exclusion of office, clerical and technical employees.

7. The dispute between the applicant and the intervener centers on what Mr. Moore said regarding this difference and the effect of what was said on the voters' ability to express their "true wishes" in a secret ballot vote.

8. The evidence of the two witnesses called by the applicant who attended the meeting of September 2, 1982 supports the conclusion that Mr. Moore indicated that the Reply showed that the company wanted to change the scope of the bargaining unit. One of these witnesses, Mr. John Davis, at the time and currently a steward of the intervener, testified that Mr. Moore said what such a change of scope "may" involve, i.e., people in the lab and office would have to "go staff" or bump into the mill and the result would be 5 laid-off mill employees. The other witness, Mr. Randy Ellis, couldn't repeat what Mr. Moore said but said he was left with the impression that if the 5 office, clerical and technical employees were excluded from the scope of the bargaining unit, they would be offered to "go staff" and if they didn't, they would bump down and there would be a loss of 5 jobs. His job would have been one of the five. Mr. Ellis agreed under cross-examination that the loss of 5 jobs was a "guess" by Mr. Moore as to the effects of the scope of the bargaining unit being changed. Both witnesses recall Mr. Moore saying that if a vote was cast for the intervener, then the scope would not be the one in the company's reply and the office, clerical and technical employees would remain in the bargaining unit. Only Mr. Davis could testify with certainty as to what Mr. Moore said would be the effect of the applicant "getting in". His evidence was that if the applicant got in, the company was going to change the scope clause. While Mr. Ellis couldn't recall precisely what Mr. Moore said, regarding the likelihood of the scope clause changing, he was left with the impression that if the employees voted for the applicant, the scope clause in the Reply would be "it"; there was no doubt in his mind therefore that if he voted for the applicant he would be laid off. Mr. Ellis acknowledged in cross-examination that what Mr. Moore said was Mr. Moore's impression of what would happen if the new union got in. Mr. Davis, perhaps because of his greater knowledge and experience as steward, appears to have had a greater participation at the meeting. When Mr. Moore stated the effects of the scope clause as set out in the company's Reply, Mr. Davis testified that he asked him about "what was posted on the board", referring to the notice of Application for Certification. He claims that he pointed out to Mr. Moore that the description in the Reply was completely different from the one posted. At some point Mr. Davis said that someone asked Mr. Moore whether the unit description was a "negotiable item". Mr. Davis claims that he couldn't remember whether Mr. Moore answered or not.

9. The meeting which in total took up about 2 hours also dealt with the company's counterproposals to the intervener's proposals for amendments to the subsist-

ing collective agreement. According to Mr. Davis, Mr. Moore pointed to the fact that the counterproposals did not contain any changes to the scope clause as evidence that if the company was going to change the scope clause in the negotiations, it would have put the new one in the counterproposal. In Mr. Davis' estimation, this point tied into the prior points Mr. Moore had made regarding the scope clause in the Reply because the conclusion to be drawn was if the applicant got in, the company was going to change the scope clause.

10. The applicant was permitted to call evidence not particularized in its original letter to the Board regarding a certain conversation between Mr. William Walling, a Quality Control Technician and one of the persons encompassed within the office, clerical and technical group, to show a "consistent pattern of communication by Mr. Moore". This conversation took place the day after the Thursday evening membership meeting described above. Mr. Moore sought Mr. Walling out at his work location and showed Mr. Walling the Respondent's Reply. Mr. Moore and Mr. Walling had had a conversation earlier in the week wherein Mr. Moore had informed Mr. Walling that he had learned there was a document showing the company wanted to change the scope clause of the agreement. Therefore, when Mr. Moore showed Mr. Walling the copy of the Reply, Mr. Walling understood it to be the document of which Mr. Moore had been speaking prior to September 3rd. Mr. Walling claims that Mr. Moore said that this was "the new scope we'd be working under" if the applicant got in. Mr. Walling claims Mr. Moore said nothing about the company *per se* but Mr. Walling understood that it was the company that wanted to change the scope. Mr. Moore's evidence is to the effect that he showed Mr. Walling the Reply saying that it was the document they had been talking about and that Mr. Walling should read it. He claims he said nothing more.

11. Not surprisingly Mr. Moore was the union's key witness. Mr. Moore claims that after reading the whole of the Reply to the employees gathered at the September 2, 1982 meeting and circulating it along with a letter from Mr. Aynsley, the Director [sic] of the Board, he gave his impression of what would take place, of what would happen if the applicant were voted in on September 9, 1982. He specifically denied telling the meeting that if the applicant were voted in, it was "definite" that the scope clause of the collective agreement would change. His testimony was that he told the employees gathered that it would "appear" to him that the company would "attempt" to change the scope clause if the vote went in favour of the applicant. Under cross-examination he agreed he said that the company had not suggested a change to the scope clause as long as the intervener remained the bargaining agent. He claimed that if the intervener were "solidified" there would be no changes to it, but with the applicant there would "possibly be changes and everything pointed to that". He acknowledged that while he stated that if the bargaining unit became the one stated in the Reply 5 jobs would be lost, this assertion was based on the "possibility" of the change. He also agreed under cross-examination that he mentioned the name of "Jenny" in the payroll department. He acknowledged that he knew she was well liked by the members of the bargaining unit. When asked in cross-examination whether he intended, by saying all these things, to raise the threat that 5 jobs would be lost if the vote went in favour of the applicant, he denied this intention. He claimed his reason for pointing out the Reply's scope clause was that he felt people should know about the document and his opinion as to what would take place as a result of the document.

12. It is undisputed that the meeting of September 2, 1982 occurred some six days after a meeting between the representatives of the parties in the instant application and Angus Smith, a Labour Relations Officer, to determine the voting constituency. Mr. Moore, Mr. Mattocks and Mr. Clarence Galliot, District Representative for Eastern Canada, were there on behalf of the intervener. Mr. Gaston Berube was representing the company, Mr. Donald Burshaw, Project Director of the Canadian Cement Gypsum & Lime Workers branch of the applicant and Mr. Bernard Davis attended on behalf of the applicant. The events of this meeting have some significance in the applicant's contention because they tend to show that Mr. Moore's intentions were to mislead the gathering of September 9, 1982; he already had known on August 26th what the company's Reply entailed and the bargaining unit description had been settled nevertheless. Mr. Moore claimed that from his point of view the August 26th meeting was to verify the voters list and to deal with the "problem" of 5 names being deleted from the list. These 5 were employees in the office and lab. He testified that both before and after this meeting Mr. Berube had made the statement that the company would try to change the scope clause either through negotiations or by appeal to the Labour Board. He also acknowledged that the result of the August 26th meeting was the addition of the 5 names of those originally not on the list. While admitting, under cross-examination, that he knew in order for the list to be determined that they first had to decide what the bargaining unit was going to be, he denied emphatically that either Mr. Mattocks or Mr. Galliot had a copy of the company's Reply (Form 10) at that meeting. He indicated that the first he heard of the Form 10 was when he received a call from Mr. Mattocks on August 30th from Kingston. Mr. Mattocks told him that his wife had received a document from the Labour Board and he read to Mr. Moore what she had informed him was on it. Mr. Moore believed from this that the company wanted to change the scope clause. He said he went to work the next day and told the people about it and someone said it might be a good idea to have the document available for the Thursday night meeting. On Wednesday Mr. Moore phoned Mr. Mattocks and arranged that he meet him half-way to Ajax to get a copy of the document so that he could give it to the people the following evening. According to Mr. Moore, the reason why he persisted in thinking that the company wished to change the scope clause, even after the August 26th meeting where the voting constituency was settled, was because Mr. Berube had reiterated at the close of the meeting that the company would try to do so, either through negotiations or appeal to the Labour Board. Under cross-examination Mr. Moore admitted that while he did know on August 26th the company's position regarding its intention to change the unit, he did not put forward his interpretation of it until September 2 because he needed the document showing this and that he wouldn't have said anything at the Thursday meeting unless he had the document.

13. Mr. Donald Burshaw testified that at the August 26th meeting Mr. Smith indicated that the bargaining unit description applied for was the same as the one in the collective agreement between the respondent and the intervener. He asked whether the intervener had any objections to this and receiving a negative answer from Mr. Mattocks, Mr. Smith then "read out Form 10" which Gaston Berube had sent in. Mr. Burshaw claims he was surprised by this since he hadn't been aware of the content of the Reply prior to the meeting. Mr. Burshaw agreed that Mr. Berube was "strong on" changing the scope clause. Mr. Smith pointed out to Mr. Berube that in a displacement application where there was an agreed bargaining unit (between the applicant and the

intervener) any revisions to the bargaining unit had to be taken care of in negotiations. Mr. Berube replied that he might take it to the Labour Relations Board. At this juncture Mr. Smith said the bargaining unit, as agreed between the applicant and the intervener, would stand and they proceeded to settle the list. Mr. Burshaw recalls Mr. Moore saying that his name was not on the list, to which Mr. Burshaw replied that if he had any problems or objections, he should make them to the officer. The omission of the 5 names from the list was explained to be caused by the company taking those names off who were excluded in their own description of the bargaining unit. The names of the 5 were added as a result of the meeting. What is noticeably absent from Mr. Burshaw's evidence is whether he or anyone else received a copy of Form 10 on August 26, how he knew the officer was reading out Form 10 and whether anyone unacquainted with the Board's procedures would necessarily know that Form 10 was the basis for the Labour Relations Officer's recitation of the bargaining unit the company proposed.

14. Another aspect of the timing of the September 2 meeting which the applicant contends is of significance is the fact that it occurred in the evening before the last working day prior to the Labour Day weekend. The 72-hour "silent period" required by the Board's procedures commenced at midnight on Sunday. Therefore, the applicant argues, there was little or no opportunity for the applicant to respond or counteract the mis-statements of Mr. Moore. The intervener, on the other hand, argues that there was sufficient time – 3½ calendar days and, in terms of working time, the evening of Thursday and all of Friday. In any event, there was no "choice" to the meeting taking place on Thursday because it was a regular monthly membership meeting. Mr. Moore in cross-examination admitted that he knew the time for the applicant responding was a bit short, but the timing of his remarks was dictated by the receipt of the document on Wednesday showing the company's intention to change the scope of the bargaining unit.

15. There was no dispute that all these events took place during a time of electioneering. According to Mr. Brushaw, the applicant's campaign had begun in the first part of May and went on until September 1 and there had been numerous meetings and debates between the two unions throughout this period.

16. Section 103(5) of the Act provides:

Where the Board determines that a representation vote is to be taken amongst the employees in a bargaining unit or voting constituency, the Board may hold such additional representation votes as it considers necessary to determine the true wishes of the employees.

This section gives the Board discretionary power to call a second vote where the first has not revealed the true wishes of employees. The principles upon which the Board has relied in exercising its discretion under this section are set out in cases cited to the Board by the applicant, namely, *Joseph Gould & Sons Limited*, 52 CLLC ¶17,039; *Stauffer-Dobbie Manufacturing Co. Ltd.*, 59 CLLC ¶18,147; and *McMaster University*, [1979] OLRB Rep. July 685. While only *Joseph Gould* involved a representation vote in a displacement application, the principles, as stated, appear not to vary whether it be a vote held in connection with a regular application for certification (*McMaster*, supra) or in a vote in connection with termination application (*Stauffer-Dobbie*, supra). The Board has stated in all of these cases, in different words, that it will not monitor or

evaluate the campaigning of either party unless the way in which the campaigning has taken place and the content of what was said is such as to impair the opposite party from responding or to interfere critically with the ability of the employees' expression of their free wishes in a secret vote. It appears that proof of the intention to mislead or so interfere is not essential to the success of a request pursuant to section 103(5) (see *McMaster*, supra).

17. The applicant urges as a test for the statements made by Mr. Moore whether the statements "seriously mislead the reasonable voter" (from *Stauffer-Dobbie*, supra). On this basis the application urges us to conclude that Mr. Moore purposely misled and deceived the employees, and by raising a fundamental issue of "major importance" at the late date of Thursday, September 2, made it impossible for the applicant to counteract its effects. The respondent based its argument that no new vote ought to be held on two broad grounds, namely,

- 1) that the allegations the applicant raises are untimely and constitute a second bite of the cherry (*Chateau Gardens*, [1977] OLRB Rep. Jan. 12 and *Mallett Wood Products*, [1979] OLRB Rep. Jan. 41 cited as authorities) and
- 2) that negotiations have been proceeding since September 9th with the incumbent union based on results of the vote and the progress made should not be lightly disturbed.

The intervener stresses that the onus on the applicant in these cases is a heavy one and the evidence shows that the applicant has failed to establish an intention to mislead and the fact of any misleading by Mr. Moore at all. Counsel for the intervener characterized Mr. Moore as having expressed his *opinion* as to what would happen in the event the applicant became certified and that he was stating the "truth" when he indicated that the company, having expressed a desire to change the scope of the unit, would try to sit down and get a different scope from the applicant. The intervener also raised the issue of timeliness in much the same form as the respondent. The applicant argues that the timeliness argument ought not to be entertained because the first time the applicant heard about it was in argument, and if it had been in allegation, it would have called evidence.

18. The Board has decided that this matter ought not to be resolved on the basis of the timeliness of the applicant's objections to the vote because the applicant was not given notice of this argument and was not given an opportunity to call evidence on it, nor did the cross-examination of the applicant's witnesses indicate this to be a part of the intervener's or respondent's response.

19. The question the Board must decide is whether the effect of Mr. Moore's statements, either as they are described by the intervener or by the applicant, are so serious as to undermine the results of the vote of September 9, 1982. The question of intention is not relevant in this assessment and therefore the Board makes no conclusion on Mr. Moore's intention. We find that Mr. Moore did indicate to the employees gathered, using the Reply filed by the company, that given the company's intention to try to change the scope of the bargaining unit now that the applicant had applied for

certification and the fact that the scope had remained the same during the period the incumbent union held representation rights, the safest surest course was to vote for the incumbent. He went further to state that if the applicant were certified, the company would try to get a new scope clause and "everything pointed to" changes which would result in the loss of 5 jobs. It is reasonable to assume that anyone listening to Mr. Moore would conclude at least that 5 jobs would be potentially jeopardized by the election of the applicant and that a vote for a new unknown bargaining agent could result in a new scope clause along the lines proposed by the company in its Reply. We have no difficulty in concluding that the impression left or created was that at least 5 jobs were potentially put into question by the election of the applicant. The Board has concluded that this is within the bounds of electioneering and in the circumstances would not seriously mislead the listeners. The evidence indicates that the meeting involved the "give and take" on the subject, with one person querying whether it was a negotiable item and another challenging the difference between the unit described in the Reply and the one in the Notice of Application for Certification.

20. Even if we accepted that Mr. Moore went further than simply predicting possible change and loss of 5 jobs if the application was successful, and actually claimed that this result was a certainty, the Board would not come to a different conclusion in the circumstances because these statements fall within the boundaries of electioneering between two unions seeking employee support. In the *Stauffer-Dobbie* decision, *supra*, the Board stated at p. 1790:

... In the main, however a considerable amount of leeway is permitted in electioneering. The Board does not undertake to police election campaigns *or to consider the truth or falsity of campaign literature and speeches unless the ability of the employees to evaluate such literature or speeches is impaired*, e.g., by the use of campaign trickery, to such an extent that the free desires of the employees cannot be determined in a secret vote.

(emphasis added)

We are not prepared to consider what Mr. Moore did or said as "campaign trickery". He was speaking to a group of employees who had been the subject of a lengthy campaign by the applicant and who, prior to that, had been involved in a collective bargaining relationship. They were informed as to the basis of Mr. Moore's concerns because copies of the Reply were circulated and its contents read out. Mr. Moore was challenged on the conclusions he was drawing from it and it is unlikely that his statements would in this context be reasonably regarded as anything more than his views put forward to persuade them to stick with the intervener in the vote. Proof of this is that at least one of the applicant's witnesses regarded his statements as such.

21. Because of the conclusion the Board has arrived at regarding the content of the statements Mr. Moore made, it is unnecessary to come to any conclusion as to the adequacy of length of time the applicant had to respond in the circumstances.

22. The application for certification is, therefore, dismissed on the basis that of the ballots cast, less than fifty per cent indicated a desire to be represented by the applicant.

23. The Board will not entertain an application for certification by the respondent in the bargaining unit within the period of six months from the date hereof.

24. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision, unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

0797-81-R; 1223-81-R Labourers' International Union of North America, Local 183, Applicant, v. **J.C. Carpentry**, Respondent; The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, Applicant, v. Camay Carpentry Limited **J.C. Carpentry Limited J.C. Carpentry Respondents**

Certification – Reconsideration – Sale of a Business – Labourers Union certified without hearing – Carpenters Union not having notice – Claiming bargaining rights for subject employees – Board finding Carpenters having bargaining rights for part of unit given through sale of business – Board amending unit given to labourers – Revoking certificate and issuing amended certificate

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. Gibson and H. Kobryn.

DECISION OF THE BOARD; November 24, 1982

1. For reasons given elsewhere in this decision, the name of the respondent J & C Carpentry appearing in the style of cause of the application in Board File No. 0797-81-R is amended to read "J. C. Carpentry" and the names J.C. Carpentry Ltd., Camay Carpentry Limited, J.C. Carpentry and J & C Carpentry appearing in the style of cause of the application in Board File No. 1223-81-R are amended to read "Camay Carpentry Limited, J.C. Carpentry Limited and J.C. Carpentry".

2. Following four days of hearings into these two applications the Board issued a decision which, in part, reads as follows:

5. For reasons which will be issued in writing at a later date and having regard for the evidence and representations of the parties with respect to the request for reconsideration in File No. 0797-81-R and with respect to all matters arising out of and incidental to the application filed under section 1(4) and 63 of the Act, the Board finds, declares and directs as follows:

(a) that the Board should exercise its discretion under section 106(1) of the *Labour Relations Act* to amend, vary or revoke its

decision which was issued July 31st, 1981, including the certificate which was issued pursuant to that decision and further that Local 183 and J & C Carpentry return to the Registrar forthwith the certificate which was issued July 31st, 1981;

- (b) that Camay Carpentry Limited and the United Brotherhood of Carpenters and Joiners of America, Local 1190 were bound to the collective agreement between the Toronto and District Carpentry Contractors Association and The Carpenters' Association and The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190 signed May 16th, 1980 to be in effect from May 1st, 1979 until April 30th, 1981;
- (c) that a sale of part of a business within the meaning of section 63(1) of the *Labour Relations Act* has taken place between Camay Carpentry Limited, the predecessor employer, and J.C. Carpentry, the successor employer on or about May 31st, 1980;
- (d) that J. C. Carpentry, as the successor employer in the foregoing sale of part of a business became bound to the collective agreement referred to in item (b) above and consequently is bound to the successor collective agreement between the Toronto and District Carpentry Contractors Association and The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190 signed May 6th, 1981 to be in effect from May 4th, 1981 until April 30th, 1983;
- (e) that the name J & C Carpentry appearing in the style of cause in File No. 0797-81-R as the name of the respondent be amended to read J.C. Carpentry and further that paragraph 6 of the Board's decision with respect to that application be deleted and replaced by the following:

"It appears to the Board that the respondent had in its employ in the Board's geographic area #8 carpenters only on the date of the making of this application. Having regard to the foregoing and pursuant to section 6(1) of the *Labour Relations Act*, the Board further finds that all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman and all carpenters and carpenters' apprentices covered by a subsisting collec-

tive agreement between the Toronto and District Carpentry Contractors Association and The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190, constitute a unit of employees of the respondent appropriate for collective bargaining.”;

- (f) that the Board's decision in File No. 0797-81-R be amended further by substituting the following for paragraph 7 and re-numbering the present paragraph 7 and paragraph 8:

“For the purposes of clarity, the Board notes that the subsisting collective agreement referred to in paragraph 6 above applies only to high-rise residential building projects;

- (g) that a revised certificate will issue to Labourers' International Union of North America, Local 183 pursuant to the amended paragraph 6 as set out in item (e) above.

3. The chronology of the circumstances under which these two applications came to be heard together were set out in some detail in the Board's decision and it is sufficient here just to summarize them briefly. Some two weeks after the Board had certified the applicant (“Local 183”) to represent the carpenters and carpenters' apprentices employed by the respondent (“J.C. Carpentry”) in the residential sector in Board area 8 of the construction industry, the applicant in Board File No. 1223-81-R (“the Council”) requested that the Board reconsider its decision to certify Local 183. The Board had certified Local 183 without a hearing pursuant to the Board's discretion under section 102(14) of the *Labour Relations Act*. In making the request for reconsideration, the Council was relying on a collective agreement which it alleged to be binding on J.C. Carpentry. Approximately three weeks after making its request, the Council filed the application in Board File No. 1223-81-R seeking to have the Board apply sections 1(4) and 63 of the Act with respect to the respondents named in the application.

4. The decision herein deals with three matters arising out of the earlier one: the reasons for granting the reconsideration, for revoking the certificate originally issued to Local 183 and issuing an amended certificate; the reasons for finding that the sale of part of a business had taken place between Camay Carpentry Limited and J.C. Carpentry; and the Board's decision with respect the Council's request for the declaration under section 1(4) of the Act that Camay Carpentry Limited, J.C. Carpentry Limited and J.C. Carpentry be treated as constituting one employer for purposes of the Act.

5. There were two significant events taking place at the times material to the application for certification. These were a postal strike and an intensive campaign to organize employees of house building contractors in the residential sector of the construction industry in the Board's geographic area no. 8 being carried on by Local 183 and by the Council's affiliated Local 1190 in direct competition with each other. One of the alternative methods used by the Board to contend with the postal strike was to set up

a "pick-up" area at the Board's offices where parties who regularly appeared before the Board could pick-up their mail from it. A business representative of the Council was assigned to pick-up mail for it and for Local 1190.

6. Mr. Kenneth Weller, business agent for Local 675, a sister Local of Local 1190, had been loaned to Local 1190 to assist Mr. James Tobin in the Local's campaign to organize employees of house building contractors. Tobin is an international representative of the United Brotherhood of Carpenters and Joiners of America ("the United Brotherhood"). Part of Weller's duties was to scrutinize all of the documents which were being processed in connection with applications for certification being filed by Local 1190. He testified that there were some 20 applications in which both Local 183 and Local 1190 filed applications and/or interventions. He and Tobin relied on reports from the representatives who were conducting the campaign at the job sites as to the organizing activity of Local 183. Weller testified that Local 1190 did not receive any notice of the application for certification here at issue but either he or Tobin subsequently learned that an application had been made whereupon they checked the application against the list of employers bound to the collective agreement between the Toronto and District Carpentry Contractors Association and The Carpenters' Section of the Carpenters' District Council of Toronto and Vicinity. This resulted in them contacting the Council's solicitor who filed this request for reconsideration.

7. Section 113(1) of the Act which deals with mailed notices and communications provides as follows:

113.—(1) For the purposes of this Act and of any proceedings taken under it, any notice or communication sent through Her Majesty's mails shall be presumed, unless the contrary is proved, to have been received by the addressee in the ordinary course of mail.

The Board's record of this application shows a copy of the notice of the application for certification by Local 183 to have been prepared for Local 1190. The interruption of postal services by the strike, however, would not have permitted the Board to send the notice "... through Her Majesty's mails ..." therefore the presumption set out in section 113(1) would not apply in these circumstances. The Board, having heard Mr. Weller's evidence and the submissions of the parties thereon is satisfied that Local 1190 did not receive notice of the application for certification by Local 183. The Board is also satisfied that Local 1190 acted promptly to protect its potential interests when it learned that the application had been made. Having further regard for the evidence before the Board, the submissions of the parties, the circumstances with respect to the postal strike and the fact that bargaining rights alleged to have been subsisting at the time of the application were at issue in the request for reconsideration, the Board is satisfied that these are circumstances in which it is advisable for the Board to reconsider its decision with respect to the application.

8. This decision was rendered orally at the hearing and after so doing, the Board proceeded to hear the evidence and the submissions of the parties with respect to the application filed under sections 1(4) and 63 of the Act, the bargaining relationship alleged to exist between J.C. Carpentry, the Council and Local 1190 and whether the Board should exercise its discretion under section 106(1) to vary or revoke its decision.

The Board heard the evidence of Mr. Giuseppe (Joe) Cantagallo with respect to the relationship between Camay Carpentry Limited ("Camay"), J.C. Carpentry Limited and J.C. Carpentry and the collective bargaining relationship with the Council and Local 1190. Cantagallo is the sole owner of J.C. Carpentry Limited and J.C. Carpentry and one of two partners in Camay. The Board heard also the evidence of Mr. Fred Leach, Business Manager of the Carpenters' District Council of Toronto and Vicinity and its Local 1190 with respect to the bargaining relationship between the Council, Local 1190 and the respondents. The Board's findings of fact based on their evidence are set out below.

9. Cantagallo formed J.C. Carpentry in 1972 as a sole proprietorship and had registered it as such by the end of 1972 or early 1973. He operated it as a single proprietorship until August 1975 in the business of building single dwellings, townhouses and high-rise apartments in the residential sector of the construction industry. In August 1975, Mario Maggio invested in the partnership for a 50/50 share of its profits. They agreed to incorporate the partnership as Camay and this was completed by December 1975. Until then the partnership operated as J.C. Carpentry. Between August and December 1975 the two partners borrowed money to invest in Camay and Cantagallo brought to it all of J.C. Carpentry's assets. The value of these assets on Camay's books formed part of Cantagallo's share interest in Camay. The partnership continued the same kind of business as had been done by J.C. Carpentry until late May or early June of 1980 when the partnership was wound up. The partners divided the assets of the business according to their interests as recorded on its books. In this respect Maggio took one van and Cantagallo took a second one, a compressor, a lift truck and all of the other equipment which included mostly power tools. Camay had two contracts for the construction of houses at the time of dissolution. Maggio took the smaller of the two, which was for a house building project in Mississauga and Cantagallo took the other one which was for development in Newmarket consisting of single houses and townhouses. Cantagallo signed, in the name of J.C. Carpentry, the same contract as had existed between Camay and the builder. Camay had twelve employees at dissolution; Maggio took three of them and Cantagallo took the remainder. The dissolution of Camay was registered and the registration was confirmed in November 1981. The business of Camay was conducted from Cantagallo's home as had been the case with J.C. Carpentry prior to formation of the partnership. Cantagallo maintained the registration of J.C. Carpentry as a sole proprietorship after the formation of the partnership, but did not do any business in the name of J.C. Carpentry. Consequently, when the partnership was dissolved he immediately resumed business in the name J.C. Carpentry and continued to operate the business from his home.

10. It was one these facts that the Board found that there had been a sale of part of Camay's business to J.C. Carpentry within the meaning of section 63(1) of the Act. The facts leave no doubt that J.C. Carpentry stepped into Camay's shoes with respect to the taking over of the larger of the two construction contracts, acquiring as Cantagallo's share of Camay all of its assets except the one van which was taken by Maggio and nine of the twelve employees who had worked for Camay. All of these employees went to work for J.C. Carpentry on the house building contract which Camay previously had held. There was no hiatus of business whatsoever. Thus, J.C. Carpentry has continued in the same business, employing most of the same employees, utilizing most of the assets formerly belonging to Camay. Therefore if Camay was bound to a collective

agreement to which Local 1190 was also bound, that collective agreement would continue to be binding on J.C. Carpentry pursuant to the provisions of section 63(2) of the Act.

11. The Council and Local 1190 are relying for their intervention in the application for certification on a collective agreement between the Toronto and District Carpentry Contractors Association ("the Association") and the Council on behalf of Local 1190 that is effective from May 4th, 1981 until April 30, 1983, or in the alternative, on a collective agreement effective March 23rd, 1978 until April 30th, 1979 between Camay and the Council on behalf of Local Union 1190. This latter agreement is in the identical form of the agreement between the Association and Council and has Camay's name added to the name of the employer in a space specifically provided for that purpose. The Board is satisfied that the agreement signed by Camay was identical in all respects, including its duration, with the collective agreement concurrently in effect between the Association and Council. The Board is satisfied also on the evidence that the agreement between the Association and Council and between Camay and the Council applied only to high-rise apartment construction in the residential sector of the construction industry.

12. The Act defines a collective agreement in the following terms in section 1(1)(e):

1.-(1) In this Act,

(e) "collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement.

13. The Association collective agreement purports to be binding on two groups of employers: members of the Association and employers who are not members of it. Camay is amongst the latter group of employers. The employers who are members of the Association are listed in Schedule 1 to the Agreement and the other employers are listed in Schedule 2. Cantagallo has not signed another Association agreement for either Camay or J.C. Carpentry since he signed the 1978-79 Association agreement for Camay. There have been two agreements signed between the Association and the Council, one for the period May 1, 1979 to April 30th, 1981 and the current agreement for the period May 4th, 1981 to April 30th, 1983. Cantagallo considered Camay to be bound to the 1979-81 Association agreement even though neither he nor Maggio had signed it for Camay. Cantagallo relied on the Association to bargain for Camay and to represent its interests in the negotiations. The Association advised Camay of the notice to bargain from the union and after negotiations were settled, advised Camay by letter of the new rates of wages and contributions to be paid. Camay received a copy of the collective agreement from the Association in due course. Camay performed under the collective

agreement whenever it was doing work covered by it and part of its performance was to pay a uniform hourly contribution to the Association, the same contribution paid by its members, at the same time that Camay paid its other remittances for the union's welfare, pension and vacation pay funds. Cantagallo had signed the Association agreement for Camay because he had considered J.C. Carpentry to be bound by the same agreement and to have been represented by the Association in collective bargaining with the Council and Local 1190. J. C. Carpentry regularly had made the remittances called for by the collective agreement for welfare, pension, vacation pay and employer contributions to the Association during the period prior to the formation of Camay whenever it was working on high-rise apartment construction. In fact, when Camay was incorporated, one of the first acts Cantagallo performed was to go to the union office and advise them that Camay would be paying the wages of his employees in future. Notwithstanding the evidence that Cantagallo considered J.C. Carpentry to be bound by the Association's agreement, neither he nor the Council and Local 1190 produced in evidence a collective agreement or other document by which J.C. Carpentry undertook to be bound by the Association's agreement.

14. Mr. Fred Leach has been involved personally on behalf of the Council and Local 1190 in the negotiations with the Association since the 1970-71 agreement. He has been chairman of the union's negotiating committee since 1975. During all of his experience, the Association has negotiated on behalf of its members and on behalf of the non-member employers. The Association has represented the non-member employers in grievances under the collective agreement. The only way a non-member employer can become covered by the Association agreement for the first time is to sign a copy of it. The form of the agreement specifically accommodates this in its style and that was the form of the agreement signed by Cantagallo for Camay. The prior practice of the Council had been to have a non-member employer sign a single-page document accepting to be bound by the Association's agreement. It later changed its practice and had all of the non-member employers who had previously signed the "pick-up" document sign a copy of the collective agreement and all new non-member employers do likewise. There have been no instances of non-member employers claiming not to be bound by the Association's agreement and specifically none of the respondents in Board File No. 1223-81-R have claimed not to be bound by the Agreement nor has anyone of them notified the Council or Local 1190 that it wished no longer to be bound by the Association's agreement. The Association's agreement has not been enforced in the house building part of the residential sector and has been applied only in the construction of high-rise apartment buildings. This is by way of a specific undertaking between the Association, the Council and Local 1190 that it will not be applied to house building until the Council and Local 1190 acquire bargaining rights in respect of the employees of 51 per cent or more of the employers working in the house building part of the residential sector.

15. The Board finds on the evidence that Cantagallo's act of signing the 1978-79 Association agreement and Camay's subsequent performance under that collective agreement was intended and did give the Association the authority to bargain on behalf of Camay and bind it to the Association's agreement. All of the evidence before it with respect to the bargaining relationship supports and is consistent with that intention. No action has been taken by Cantagallo on behalf of either Camay or J.C. Carpentry to withdraw the authority from the Association to bargain on behalf of either Camay or

J.C. Carpentry. Therefore, when the 1978-1979 agreement expired, Camay continued to be bound by the 1979-81 collective agreement and when J.C. Carpentry became the successor employer in part of Camay's business on or about May 31st, 1980, it stepped into Camay's shoes with respect to its obligations under the Association's 1979-81 agreement and continues to be bound by the successor agreement which is in effect May 4th, 1981 to April 30th, 1983.

16. It is for these reasons that the Board made the findings set out in items (b) and (d) of paragraph 5 of the prior decision as quoted in paragraph 2 above.

17. Since the Association's agreement relates only to high-rise apartment construction, it does not operate as an absolute bar to the application for certification in Board File No. 0797-81-R. It does operate, however, as a partial bar with respect to that part of the residential sector described as high-rise residential building projects. It is for this reason that the Board amended its original description of the bargaining unit in the decision certifying Local 183 to read as set out in item (e) of paragraph 5 and subject to the clarity note in item (f) of paragraph 5.

18. It remains only for the Board to deal with the application under section 1(4) of the Act to have the three respondents treated by the Board as constituting one employer for the purposes of the Act. The uncontradicted evidence before the Board is that Camay has ceased doing any business, is wound up and dissolved and that J.C. Carpentry Limited has not conducted any business whatsoever. Even were the Board to make a finding in these circumstances that the three respondents or any two of them were carrying on associated or related business activities under common control or direction, and it makes no finding either way, the Board would see no useful labour relations purpose being served by granting the declaration requested and it would decline to exercise its jurisdiction to declare that the three respondents, or any two of them, be treated as constituting one employer for purposes of the Act.

1364-82-R Labourers' International Union of North America, Local 183, Applicant, v. **J. D. S. Investments Limited**, Respondent, v. Labourers' International Union of North America, Local 506, Intervener

Certification – Construction Industry – Evidence – Practice and Procedure – Application relating to residential sector – Working agreement unambiguous that residential sector excluded – Board not permitting respondent to adduce evidence of arrangement to include residential sector in working agreement

BEFORE: R. A. Furness, Vice-Chairman, and Board Members W. Gibson and H. Kobryn.

APPEARANCES: *B. Fishbein, C. De Toni, O. Zanin and A. Pinto for the applicant; Robin B. Cumine, Q.C., and Ed Kletke for the respondent; and no one for the intervener.*

DECISION OF THE BOARD; November 30, 1982

1. The Board notes that the applicant has withdrawn its request that the Board apply the provisions of section 1(4) to the respondents who were formerly named in this application for certification. The Board consents to this withdrawal.

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3. Initially the applicant applied for certification with respect to a bargaining unit of construction labourers under section 144(1) of the Act. Subsequently, the applicant informed the Board that its application for certification was being made pursuant to section 144(3), and, that the bargaining unit sought by the applicant was defined as “all construction labourers employed by the respondent in the Board’s geographic area #8 in the residential sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman”. During the course of the hearing the respondent agreed that if there was an appropriate bargaining unit then the bargaining unit defined by the applicant was the appropriate bargaining unit.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

5. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act*.

6. The Board further finds that this application for certification does not relate to the industrial commercial and institutional sector of the construction industry referred to in section 117(e) of the *Labour Relations Act*.

7. On July 10, 1969, the respondent and the Toronto Building and Construction Trades Council (the “Council”) entered into a Working Agreement (the “agreement”). The agreement consists not only of the usual one page (at that time) but also included an

addendum and a schedule "A" which by the terms of paragraph seven of the agreement are made part of the agreement. Paragraphs two and three of the agreement state

2. The Company recognizes the Council and its affiliated unions as the collective bargaining agency for all its employees.
3. Subject to the Addendum, the Company agrees that it will employ only members of the unions affiliated with the Council and will let contracts or sub-contracts only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council and will do all things necessary to insure that only members of the unions affiliated with the Council are employed in construction work in which the Company is engaged.

Article 1.00 of the addendum states:

"The Council" agrees that the "Working Agreement" shall not apply to "Residential" construction and shall not apply to the labourers and carpenters directly employed by "The Company" until December 15, 1969.

8. At the hearing the respondent relied on its reply which had stated that the respondent is bound by the provincial collective agreement with the Labourers' Employee Bargaining Agency and that the respondent is bound by and subject to an agreement with the Council dated July 10, 1969. In addition, the respondent argued that it be permitted to adduce evidence that an understanding existed between the respondent and the Council with respect to the residential field. It was the position of the respondent that a representative of the Council had undertaken to organize the residential field and had agreed not to place the respondent in a non-competitive position and that looking at the working agreement it really deals with the bargaining rights in all sectors for all employees. The respondent adopted the position that the residential bargaining rights have been dealt with in that no attempt had been made to enforce such bargaining rights until the circumstances were such that the respondent would not be effectively destroyed. The respondent also argued that the Council has bargaining rights in the residential field which have been dealt with in an overall manner.

9. The applicant opposed the request by the respondent that it be allowed to introduce evidence. At the conclusion of the argument, the Board ruled orally that, having considered the representations of the parties and for reasons to be given in writing, it was not prepared to permit the respondent to call the evidence which had been outlined before the Board. These reasons are now set forth.

10. The working agreement and the addendum which was entered into between the respondent and the Council on behalf of its affiliates is clear and unambiguous and clearly excludes residential construction from its coverage. The Board was not prepared to hear the evidence outlined by the respondent for three reasons. Firstly, the Board's

jurisdiction is set forth in the *Labour Relations Act* and providing the requirements of the Act have been satisfied the Board has no jurisdiction to impose any equitable bars, see *Christie, Brown & Company Limited*, [1975] OLRB Rep. June 524; *Firestone Steel Products of Canada Limited*, [1970] OLRB Rep. Sept. 660 and *The Shopmen's Local Union No. 743 of the International Association of Bridge, Structural and Ornamental Iron Workers v. Brayshaws Steel Ltd.*, 71 CLLC ¶14,084. Secondly, the respondent and the Council are not competent by private agreement to contract out of the provisions of the Act, see, for example; *Whiteny Maintenance Limited*, [1973] OLRB Rep. Jan. 26, *Pigott Construction Company Limited*, [1969] OLRB Rep. June 399, *Belmont Plastering Company Limited*, [1970] OLRB Rep. March 1459 and *Hutchison Mechanical Installations Ltd.*, [1973] OLRB Rep. May 240. Thirdly, the doctrine of estoppel may not be evoked to prevent the operation of a public statute such as the *Labour Relations Act*, see *Culliton Brothers Limited*, [1982] OLRB Rep. March 357, *Maritime Electric Co. v. General Dairies Ltd.*, [1937] A.C. 610; *MacKenzie v. Moore's Taxi Co. Ltd.*, [1938] 2 D.L.R. 195, 199; *Southend-on-Sea Corporation v. Hodgson, Wickford, Ltd.*, [1961] 2 All E.R. 46, and *Walls v. Hanson*, (1965) 49 D.L.R. (2d) 435, 438.

11. The Board finds on the basis of the evidence and argument before it that the Council does not possess bargaining rights for employees of the respondent in the residential sector of the construction industry and that the applicant is entitled to make an application for certification with respect to the residential sector of the construction industry. Having regard to the circumstances of this application and pursuant to the provisions of section 144(3), the Board further finds that all construction labourers employed by the respondent in the residential sector of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. A Labour Relations Office is authorized to inquire into and report to the Board on the list and composition of the bargaining unit.

1082-82-R Brenda Millward, Lilian McFarland, Applicants, v. Service Employees Union, Local 204 A.F.L., C.I.O., C.L.C., Respondent, v. K Mart Canada Limited, Intervener

Petition – Practice and Procedure – Termination – Appropriate unit for purpose of termination application – Board finding one document encompassing two separate collective agreements – Full-time and part-time units not amalgamated – Full-time unit appropriate unit – Board not permitting all signatories to petition to testify as to voluntariness – Expressing concern as to disclosure of union support and opposition

BEFORE: Corine F. Murray, Vice-Chairman, and Board Members J.A. Ronson and B. L. Armstrong.

APPEARANCES: *Barry Edson, Brenda Millward and Beverly Wilkinson for the applicants; H. Goldblatt and A. Edge for the respondent; Robert A. MacDermid and C. A. Cumiskey for the intervener.*

DECISION OF CORINNE F. MURRAY, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; November 8, 1982

1. This is an application for a declaration terminating the bargaining rights of the respondent, pursuant to section 57(2)(a) of the *Labour Relations Act*, in respect to the following bargaining unit:

All employees of the employer employed at its K Mart store at Bayview Village Shopping Centre in the Municipality of Metropolitan Toronto, Ontario, save and except department managers, persons above the rank of department managers, management trainees, pharmacists, students employed during the school vacation period and persons who are regularly employed for not more than twenty-four (24) hours per week.

2. It was acknowledged by all parties that the application was timely and the Board so finds. No objection *per se* was made regarding the status of the applicants to bring this application but the respondent made certain submissions regarding the scope of the bargaining unit which could also raise issues of status.

3. The respondent claims that the appropriate bargaining unit for the purposes of this application is one that includes persons regularly employed for not more than 24 hours and students employed during the school vacation period. In its Reply it described such unit as follows:

Full-time and part-time retail store employees including clerical employees.

4. At the hearing the Board indicated to the parties that the applicants had submitted a petition containing names which represented over 50 per cent of those employees appearing on the Schedules submitted by the intervener listing employees in

the bargaining unit as described in the application. There were no lost names. If the appropriate bargaining unit includes part-time employees and students, as the respondent contends, this application cannot succeed in any event. It was agreed, therefore, that the Board should determine this preliminary issue prior to hearing the evidence as to the voluntariness of the applicants' petition.

5. The parties filed with the Board a document which the respondent contends is a single collective agreement encompassing one bargaining unit comprised of full-time and part-time employees (along with students employed during the school vacation period). The applicant submits that the document represents two collective agreements, one covering a full-time unit of employees and the other covering a part-time unit. The intervener takes the position whether there are one or two agreements is irrelevant. What is relevant is the definition of the bargaining unit. In the intervener's submission there are two definitions defining two bargaining units.

6. An interpretation of the document submitted is central to the determination of the appropriate bargaining unit in this application. While the Board maintains strict control over the description of bargaining units it certifies, even in the face of an agreement of the parties, (see, for example, *Kanef Properties Ltd.*, [1981] OLRB Rep. July 889), after certification, however, the parties are free to fashion their own bargaining unit in the course of legitimate negotiations. The bargaining unit once fashioned becomes the appropriate one for the purposes of an application for termination of bargaining rights pursuant to section 57(2) (*Graphics Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379). The question therefore is whether the parties have fashioned a single unit from the two units the Board certified on September 10, 1981. In this case this issue is solely determinable with reference to the document referred to above.

7. It was undisputed that the respondent was certified on September 10, 1981 as the bargaining agent for two separate units, one for full-time and one part-time and students. The description of the full-time unit as contained in the certificate issued is duplicated in Article 2.01 of the first segment of the document submitted (See para. 8 below) and the description of the part-time unit as contained in Article 1.01 of the second segment of the document (See Para. 8 below).

8. The significant portions of the document are set out below. On the top of page 1 the following appears:

This Agreement made this 29th day of August, 1982.

After recital of the parties to the agreement the following articles are set out:

ARTICLE 1 – PURPOSE

1.01. The purpose of this agreement is to establish mutually satisfactory relations between the Employer, the Union representing the employees and the employees concerned. In addition, it is the

purpose of this agreement to provide machinery for the prompt and equitable disposition of grievances and to establish and maintain satisfactory working conditions, hours of work, wages and benefits for all employees within the bargaining unit.

ARTICLE II – SCOPE AND RECOGNITION

2.01 The Union is hereby established as the sole and exclusive bargaining agent for all employees of the Employer employed at its K Mart store at Bayview Village Shopping Centre in the Municipality of Metropolitan Toronto, Ontario, save and except department managers, persons above the rank of department managers, management trainees, pharmacists, students employed during the school vacation period and persons who are regularly employed for not more than twenty-four (24) hours per week.

2.02 The Employer and the Union agree that there will be no discrimination, interference, restraint or coercion exercised or practiced by the Employer or the Union, or any of their representatives, with respect to the membership or non-membership in the Union.

Other Articles follow dealing with the usual subjects contained in the collective agreement up to and including Article XX – Duration which states:

20.01 This agreement shall become effective on the 10th day of September, 1981 and shall expire on the 9th day of September, 1982.

This portion or segment of the document comprising 15 pages concludes with the following language:

IN WITNESS WHEREOF each of the parties hereto has caused this agreement to be signed by its duly authorized representative as of the _____ day of _____, 1982

After which signatures of the representatives of the intervener and respondent appear. Following p. 15 there is a Schedule “A” (dealing with base rates for designated classifications) and an Appendix “B” setting out the benefits for which the intervener agrees to pay, together with Bereavement and Jury Leave provisions. The next following page (unnumbered) has the heading:

In the Matter of Negotiations

after which the intervener’s and respondent’s names are set out in a format identical to the first page of the document noted above. In between this and the subsequent Articles are the words “Addendum Agreement”. Article 1 – Scope and Recognition provides;

1.01 The Union is hereby established as the sole and exclusive bargaining agent for the employees of the Employer employed at its

K Mart store at Bayview Village Shopping Centre in the Municipality of Metropolitan Toronto who are regularly employed for not more than 24 hours per week or who are employed as students during the school vacation period.

Article II provides:

2.01 Only the following provisions of the collective agreement dated 29th day of August, 1982, between the Employer and the Union *related to the full time unit* at the Employer's K Mart store at Bayview Village Shopping Centre (*hereinafter called the "Full Time Collective Agreement"*) shall be applicable to employees covered by this Addendum agreement:

Article I
2.02 of Article II
Article III
Article IV
Article V
Article VI
Article VII
Article IX
Article X

(emphasis added)

Thereafter Articles III through IX deal with terms and conditions applicable to the group of employees identified in Article 1 above. Article X – Duration states:

10.01 This agreement shall become effective on the 10th day of September, 1981 and shall expire on the 9th day of September, 1982.

Following this Article is a clause at page 5 witnessing that each of the parties have signed the Addendum Agreement under which the parties' authorized representatives have signed their names. It is important also to note those Articles of the document relating to seniority. Article XI – Seniority, in the segment of the document dealing with full-time employees, after indicating how seniority is acquired, provides as follows:

11.02 The seniority rights shall only be exercisable as expressly provided in this Article.

• • •

11.08 Seniority rights as provided in this agreement shall only be exercisable *within the full time bargaining unit and shall not be applicable to any job or position performed by any person who is not within the scope of this agreement as set out in Article 2.01.*

(emphasis added)

Article IV – Seniority in the Addendum Agreement contains the following comparable clauses:

4.02 Seniority rights of an employee to whom this Addendum agreement applies shall only be exercisable as expressly provided in this Addendum agreement.

4.03 Seniority rights as provided in the Addendum agreement shall only be exercisable *within the bargaining unit and shall not be applicable to any job or position performed by any person who is not within the scope of this Addendum agreement as set out in Article 1.01 herein.*

(emphasis added)

Finally Article III – Stewards in the Addendum Agreement provides:

3.01 The Employer acknowledges the right of the Union to appoint or otherwise select two (2)) seniority employees *employed in the bargaining unit described in Article 1.01 in this Addendum agreement* to serve as stewards, each of whom, shall have at least two (2) years of seniority.

(emphasis added)

8. Section 57(2) only permits application for termination of bargaining rights to be made by an employee in the “bargaining unit defined in the collective agreement”. Section 57(3) requires the Board to ascertain the number of employees in “*the bargaining unit*” at the time the application was made and whether not less than forty-five per cent of them have voluntarily signified in writing that they no longer wish to be represented by the union. The term “bargaining unit” is not defined in the Act, and the definition of collective agreement contained in section 1(1)(e) does not mention the concept of bargaining unit. Section 1(1)(e) states:

1.-(1) In this Act,

(e) “collective agreement” means an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers’ organization, on the other hand contained provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees, and includes a provincial agreement.

Section 49 however states:

There shall be only *one collective agreement* at a time between a trade union or council of trade unions and an employer or employ-

ers, organization with respect to the employees in the bargaining unit defined in the collective agreement.

(emphasis added)

This provision, read together with section 52, indicates that with respect to the same group of employees as defined in a bargaining unit there can only be one set of terms or conditions of employment for a minimum period of 1 year. Nothing requires that the collective agreement be contained in one document or that one document could only encompass one collective agreement. The key to determining whether there is one or two collective agreements is whether there are one or two bargaining units.

9. It is apparent to the Board that the respondent and intervener have maintained the two bargaining units as originally described in the Board's certificates. There is a description of each under separate "Scope and Recognition" clauses and there is a maintenance of the distinction between the two units in key articles, i.e., seniority and stewards where any intention to treat the two units as one would have to be manifested. The way in which Articles applicable to the full time employees are made applicable to the part-time employees and students is also significant. Article II of the Addendum imports those provisions "related to the full time unit".

10. The respondent argued that an intention to fashion one unit was disclosed by the following:

- (1) the designation of the portion relating to part time employees as an "Addendum Agreement";
- (2) the fact that there was no repetition in the Addendum of the date the agreement was made;
- (3) the fact that there was no re-statement of the "purpose" clause in the Addendum.

The respondent also argued that the two separate scope and recognition clauses are merely an identification of the group to whom the different terms and conditions apply and that there is no separate part-time collective agreement, because one must, by reason of Article II, refer to Articles in the portion relating to full-time employees.

11. The Board finds none of these arguments persuasive. It is our conclusion upon looking at the whole of the document submitted that it encompasses two collective agreements, one dealing with the full-time unit and the other with the part-time unit. Articles which would usually require no distinctions along bargaining unit lines are the same in each, i.e.:

- Article I – Purpose
- Article III – Union Dues
- Article IV – Interpretation
- Article V – No Strikes No Lockouts
- Article VI – Bulletin Boards

Article VII – Management Rights
 Article IX – Policy Grievance
 Article X – Grievance Procedure

The Bulk of the Articles which differ are merely reflective of the differences in wages and benefits which are attributable to the difference in terms of employment which commonly exist between persons employed on a full-time basis and those employed on a part-time basis. Of significance to the determination of whether more than one bargaining unit exists are the Articles dealing with seniority and stewards. As noted in paragraph 8 above, both the seniority Articles XI and IV have language indicating that the seniority rights would only be exercisable within each “bargaining unit”. Also Article III in the Addendum Agreement, read together with Article VIII of the portion dealing with full-time employees, shows an intention to have two stewards per bargaining unit. These Articles are the most likely to reveal an intention to maintain two units or amalgamate them into one because the acquisition and exercise of seniority is an important component of the exercise of the union’s representation rights and is not necessarily dictated by inherent differences between employees employed on a full-time basis and those employed part-time. The same thing can be said of the designation of stewards. The adoption of language framed in terms of two separate bargaining units, as opposed to merely two groups of employees, together with the maintenance of separate scope and recognition clauses has led the Board to conclude there are two collective agreements. The fact that each was executed separately reinforces this conclusion. The use of the words “Addendum Agreement”, while *prima facie* indicating an intention to add to the first portion of the agreement, does not of itself overcome the substantive differences between the agreements noted above. The fact that numerous Articles from the full-time agreement are imported into the part-time agreement does not reveal an intention to amalgamate the bargaining units but rather an intention to make certain Articles applicable to both units. The Board has found in the context of “displacement” applications that two bargaining units may be described in one document which serves separately as a collective agreement for each of the units (see *C.G.T. Industries*, [1979] OLRB Rep. Apr. 285 and cases cited therein).

12. Even if we are wrong in concluding that there are two collective agreements contained in one document, our conclusion that there are two bargaining units can nevertheless stand. It has been stated in numerous decisions of the Board that one collective agreement can contain two or more bargaining units one of which could form the basis of an application under section 57(2) or a displacement application (see: *Kilgoran Hotels Limited*, [1974] OLRB Rep. Nov. 804; *The Sumner Printing & Publishing Company Limited*, [1967] OLRB Rep. Dec. 895, application for judicial review dismissed June 10, 1968, unreported; *Miltronics*, [1980] OLRB Rep. Jan. 10).

13. For all of these reasons the Board has determined that the bargaining unit described in the instant application is the bargaining unit with respect to which an application under section 57(2) may be made.

14. A second issue in this application was raised by the applicants regarding the evidence they proposed to call. Counsel for the applicants sought the Board’s “consent” to call all of the individuals who had signed the petition instead of the normal practice of only those persons who originated and circulated it. Counsel indicated that he felt

this was necessary to show the petition to have been voluntary, but he indicated his concern that section 111(1) of the Act would interfere with his calling the evidence he wished. Counsel for the respondent argued that it was the applicants' case to present, making the necessary judgment calls to do that, and "consent" shouldn't properly be sought. Very little more than this was said by counsel for the parties. The Board indicated that it was in agreement with the respondent's position but attached the caveat that should the Board determine otherwise in the interim between the first and subsequent hearing dates it would advise the parties.

15. Normally the Board only will hear evidence regarding the origination and circulation of a petition, in either a certification or termination application context, in order to determine whether it is voluntary. Section 102(13) of the Act provides:

The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceedings to present their evidence and to make their submissions, and the Board may, subject to the approval of the Lieutenant Governor in Council, make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as are considered advisable.

Pursuant to this the Board has formulated Rules 15 to 18, R.R.O., 1980 Reg. 546, concerning applications for the termination of bargaining rights:

15. An application for a declaration of termination of bargaining rights shall be made in quadruplicate in Form 17.

16.-(1) The registrar shall serve the applicant with a notice of the fixing of the terminal date and of hearing in Form 2.

(2) The registrar shall serve the respondent with,

(a) a copy of the application; and

(b) a notice of application and of hearing in Form 18.

(3) The registrar shall serve the employer with an appropriate number of notices of application in Form 19 for posting.

17. A respondent shall file a reply in quadruplicate in Form 20 not later than the terminal date for the application.

18.-(1) Where the application is made by a person other than the employer, the registrar shall serve the employer with a copy of the application and a notice of application and of hearing in Form 21.

(2) An employer upon whom a copy of an application and a notice of application and of hearing are served shall file his intervention, if any, in quadruplicate in Form 12 not later than the terminal date for the application.

Form 19 – Notice to Employees Application for Declaration Terminating Bargaining Rights and of Hearing before the Ontario Labour Relations Board – paragraph 7 states:

Any employee or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. *Any employee or representative who appears at the hearing will be required to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.*

(emphasis added)

and paragraph 9 states:

THE PURPOSE OF THE HEARING is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to, the application referred to in paragraph 1.

Finally, Rule 73 provides in part:

73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for . . . declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the terminal date for the application.

(2) No oral evidence . . . of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except *to identify and substantiate the written evidence referred to in subsection (1).*

• • •

(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes

testimony in the personal knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

(emphasis added)

16. It is the Board's practice to hear only such evidence as is *necessary* to establish that the origination and circulation of the petition was voluntary without doing unnecessary violence to the spirit of confidentiality contained in section 111(1) of the Act. This section ensures the secrecy of union membership by providing that:

The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

Obviously those employees instrumental in the origination and circulation of a petition or petitions must disclose, if they wish to succeed in their application, the fact that they do not desire to be represented by a trade union. But the identity of other employees who were mere signatories to the statement of desire is guarded by the Board. At the hearing, for example, the Board requires that reference to a signature be made by number, not name. It is quite clear that in normal circumstances section 111(1) would not allow a party to the proceedings to subpoena and enforce the attendance of a signatory to a petition to give evidence which would identify him/her as a signatory.

17. The question which the applicants raise is whether the signatories to the petition can *choose* to testify as to how and why they signed the petition. If they cannot do so without the consent of the Board pursuant to section 111(1), the applicants request such consent.

18. In this case one document was submitted containing 28 signatures of employees witnessed by three persons. Pursuant to Rule 73(5), the Board requires the applicants to adduce evidence as to the circumstances concerning the origination of the petition and the manner in which each signature on the statement of desire was obtained. This appears to be evidence which would not in the circumstances require all of the 28 signatories giving evidence. If the evidence is meant to show the voluntary nature of their signatures, the Board would consider this to add no probative value to the evidence of the originators and circulators. The Board in assessing the voluntariness of a statement of desire must evaluate the circumstances surrounding the origination and

circulation of the statement of desire and does not rely on the subjective testimony of any individual signatories as to their state of mind. The reason for this is the belief that the latter is not reliable evidence to determine whether an employer has inspired, influenced, encouraged or pressured signing of the statement of desire. It is not reliable because the same influences and pressures which prompted the individual to sign the statement of desire could be motivating him/her to testify that his/her signature was voluntary. Alternatively, if this type of evidence has any probative value, this is outweighed by the high risk that through 28 employees individually identifying themselves to be opposed to the union, the remaining employees' (approximately 26) desire that they wish to be represented by a trade union will thereby be revealed. Hearing the evidence of all 28 signatories would be tantamount to a disclosure of a record (i.e. the petition) which could disclose that 26 employees wished to continue membership in the union. In the alternative, it would constitute an indirect disclosure of the remaining 26 employees' wish to continue to be represented by the respondent. Therefore, on the basis of the facts known at this time, the Board, in the exercise of its overriding discretion pursuant to section 111(1), withholds its consent to such disclosure.

19. The matter is referred to the Registrar to be listed for continuation of hearing.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I agree with the majority decision on the first issue as set out in paragraph 13.

2. At our hearing the trade union advised that it would be challenging the statement of desire on the basis, inter alia, that when the employees signed the document there was no preamble indicating that the document would be used in an effort to have this Board de-certify the union. Following this, counsel for the originators and circulators of the statement of desire requested the consent of the Board as set out in the majority decision.

3. I agree with the majority that it would be premature to grant such consent at this stage of the proceedings. But, given the position of the trade union as stated above, I do not agree with the elaboration by the majority upon the issue as set out in paragraphs 14 to 18 inclusive.

4. Given the limited information available to lay employees concerning statements of desire and the nature of the Board's jurisprudence on the subject, it would also be premature for the Board to hold that in no case should it allow the signatories to the statement of desire to give evidence. For example, if the trade union leads evidence through an employee witness who refused to sign the statement, the circumstances (as divulged by the evidence) may well give the applicants the right to call such evidence as they deem sufficient in reply (*Fullers Restaurant*, 80 CLLC ¶14,021).

**0984-82-U Ontario Taxi Association, Local 1688, C.L.C., Complainant,
V. Maple Leaf Taxi Company Ltd., Respondent**

Collective Agreement – Practice and Procedure – Unfair Labour Practice – Alleged refusal to acknowledge and apply collective agreement – Whether company signatory had authority to sign – Board not deferring to arbitration where total repudiation of first collective agreement alleged

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members J.A. Ronson and C.A. Ballentine.

APPEARANCES: *Ralph Ortlieb, Ed Wright, C. Loulidakis and D. Lekos for the applicant; Nicholas P. Kapelos for the respondent.*

DECISION OF KEVIN M. BURKETT, ALTRNATE CHAIRMAN, AND BOARD MEMBER C. A. BALLENTINE; November 4, 1982

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging a violation of section 50 of the Act. Section 50 stipulates:

A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

The complainant maintains that there is a subsisting collective agreement between itself and the respondent employer which the respondent is refusing to acknowledge and apply.

2. The respondent raised two preliminary objections. It argued firstly that where it is alleged that a collective agreement has been breached the matter should be referred to an arbitrator who is empowered to ascertain, as a threshold issue, whether or not a collective agreement exists. The respondent argued secondly that in circumstances where it is challenging the union's certification before another panel of the Board, it is premature to proceed with a complaint dealing with whether or not a collective agreement exists.

3. The Board hereby affirms the oral ruling which it gave at the hearing. The Board ruled that where the allegation is one of a total repudiation of a document purported to be a first collective agreement, the Board will not defer to arbitration but will hear the matter itself. The Board refused to grant the adjournment sought by the respondent. The Board advised the parties that it would hear the evidence and argument but would only issue a decision if the panel seized with the respondent's request for reconsideration of the complainant's certificate refused to reconsider and thereby upheld the certificate.

4. The panel which entertained the respondent's request for reconsideration of the complainant's certificate issued a decision dated October 12, 1982 in which it refused

to amend, vary or revoke the certificate issued to the complainant on January 12, 1982. Accordingly, we now turn to the merits of this complaint.

5. The complainant introduced into evidence a document which on its face appears to be a collective agreement entered into between the complainant and the respondent. Article 2.01 provides in part that "... the company recognizes this union as the sole and exclusive bargaining agent for those members who are licensed as taxi owners and drivers by the City of Toronto." The document contains 13 articles dealing with terms and conditions of employment and procedures regulating the employer/employee relationship between the employees of the respondent, represented by the complainant, and the respondent. The signature of Mr. Louis Pasialis appears on the signing page under the heading "For the company." The initials "L.P." appears beside each clause in the document. Mr. Louis Pasialis was the secretary of the company at all relevant times.

6. The evidence before the Board with respect to how the document which the complainant claims is a collective agreement came into being establishes that following certification and the request by the complainant for the appointment of a conciliation officer, four bargaining sessions took place. Mr. G. Karakas and Mr. Louis Pasialis, the president and secretary of the company respectively, represented the respondent in these bargaining sessions. Mr. Karakas advised the union at the end of the second meeting that he was departing for Greece and that Mr. Koliopoulous, the vice-president, was now in charge and that he would attend or Mr. Pasialis would attend. Mr. Koliopoulous did not attend at either the third or fourth bargaining session. He was contacted by Mr. C. Loulidakis, a member of the union's bargaining committee, after the departure of Mr. Karakas, and said that he "didn't know anything about the negotiations and that he was not able to follow the steps". Mr. Pasialis appeared alone on behalf of the company at both the third and fourth bargaining sessions. He agreed to and initialed each of the clauses in the document tendered by the complainant and, on behalf of the company, affixed his signature to it. He was asked by the union prior to signing if he had the authority to sign on behalf of the company and replied in the affirmative.

7. Mr. Pasialis, as secretary of the company, had authority to sign cheques and letters on behalf of the company. He had signed an agreement between the company and the union in connection with the processing of the union's certification application. Mr. Karakas, although testifying that Mr. Pasialis did not have authority to enter into a collective agreement with the complainant union, acknowledged that Mr. Pasialis thought he had such authority at the time he signed the document on behalf of the company. Mr. Karakas also acknowledged that Mr. Pasialis had official signing authority for the company while he was in Greece. Mr. Pasialis, who resigned as secretary shortly after signing the document which the union claims is a collective agreement, was not called to testify. The evidence is that major decisions affecting the company are made by the Board of Directors. The document entered into by Mr. Pasialis was not made subject to ratification.

8. The respondent takes the position that Mr. Pasialis did not have real authority nor, given the usual manner in which decisions are made and the failure of the union to confirm the status of Mr. Pasialis, can it be found that he had ostensible authority to enter into a collective agreement on behalf of the company. In these circumstances, the

respondent asks the Board to find that no collective agreement exists and dismiss the complainant.

9. Mr. Pasialis, the secretary of the company, enjoyed signing authority for the company in the absence of Mr. Karakas, had previously entered into an agreement with the union on behalf of the company, on the evidence of Mr. Karakas believed that he had the authority to enter into a collective agreement and held himself out as having such authority. Notwithstanding the evidence of Mr. Karakas that Mr. Pasialis did not have such authority, we must conclude on the evidence before us that Mr. Pasialis had the authority to enter into a collective agreement on behalf of the company and that he did so.

10. If we are mistaken in our finding that Mr. Pasialis had real authority to enter into a collective agreement, we are satisfied that he had apparent or ostensible authority in this regard. (See *Re Hussey Seating Company (Canada) Limited* [1981] OLRB Rep Aug. 1138 for a review of the doctrine of apparent or ostensible authority. See also *Stapco Forest Products Limited* [1981] Can. LRBR 83). We are satisfied on the evidence that Mr. Karakas' advice to the union that the Vice-President would be in charge and that he and Mr. Pasialis, the secretary, would represent the company at the subsequent bargaining meetings, coupled with the advice to the union that Mr. Koliopoulous, the Vice-President, that he knew nothing about the negotiations and would not attend at the subsequent meetings, coupled with the appearance of Mr. Pasialis as the company's representative at the subsequent meetings, constitutes a representation to the union that Mr. Pasialis had the authority to negotiate on behalf of and bind the company to a collective agreement. Given the position held by Mr. Pasialis, the fact that he had signing authority and had signed a prior agreement with the union on behalf of the company, and was sent to negotiate on behalf of the company, it was reasonable for the union to accept and act upon the assurances of Mr. Pasialis that he had the authority to sign a collective agreement on behalf of the company. In these circumstances, we are satisfied that if Mr. Pasialis did not have real authority to bind the company to a collective agreement, which we have found that he did, he had ostensible authority to do so.

11. Having regard to all of the foregoing, we are satisfied that Mr. Pasialis bound the company when he signed the agreement between the company and the union dated July 14, 1982, that the agreement he signed on that date is a collective agreement which became effective as of that date and finally, that it has remained in full force and effect from that date. Accordingly, the failure of the company to abide by its terms constitutes a breach of the agreement and we so declare. The company is directed to apply the terms of the agreement retroactively to July 14, 1982, the date the agreement came into effect.

12. We will remain seized of this matter in the event of any difficulty with respect to the implementation of our direction.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I accept the evidence of the president of the employer that Mr. Pasialis did not have actual authority to sign the agreement.

2. However, in view of the circumstances at the time that the agreement was signed, I agree with the majority that Mr. Pasialis had apparent or ostensible authority to sign the agreement on behalf of the employer, and the employer is bound by it.

0710-82-M The Master Insulators' Association of Ontario Inc. and Misco Insulation Company Limited, Applicant V. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Respondent

Construction Industry Grievance – Employer hiring relative as new first year apprentice – Shop-ratio required by agreement satisfied – Union refusing to issue work permit to employee – Board finding employer entitled to hire – Union required by agreement to issue permit

BEFORE: D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and H. Kobryn.

APPEARANCES: *D. Jane Forbes-Roberts, Ken LaBelle and Ray Kirki for the applicant; M. Zigler, B. McQueen and B. Beamish for the respondent.*

DECISION OF THE BOARD; November 12, 1982

1. This is the referral of a grievance to arbitration pursuant to section 124 of the *Labour Relations Act* by the applicant Association, The Master Insulators' Association of Ontario Inc. (hereinafter referred to as the "M.I.A.") and on behalf of one of its member companies, Misco Insulation Company Limited (hereinafter referred to as "Misco"). The respondent in this matter, the International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 will be referred to as "Local 95".
2. The essential facts in this matter are not in dispute. The applicant Misco is a small insulation contractor whose president is Mr. Ken LaBelle. In January of 1982 Mr. LaBelle sought to employ in his business a relative, Mr. Paul Leger. Mr. Leger had returned from university and was looking for a job. He had apparently worked on and off for Misco in residential construction so the work in question was not unfamiliar to him. Mr. LaBelle had discussed the employment of Mr. Leger with Mr. Beamish the dispatcher of Local 95. Mr. Beamish took the position that LaBelle could only hire employees or apprentices from the union hiring hall and asked Mr. LaBelle if he wanted an apprentice sent. Beyond that Mr. Beamish referred the matter to the business manager of Local 95, Mr. McQueen.
3. As a consequence of the conversation with Mr. Beamish, Mr. LaBelle decided to hire Mr. Leger. He, in doing so, purported to make the hiring under clause 2.05(a) of the collective agreement between the M.I.A. and Local 95. He informed Local 95 by a letter addressed to Mr. Beamish dated January 12, 1982, and in that letter specifically asked Mr. Beamish to provide the apprentice Mr. Leger with a regular work permit. Local 95 has not issued a work permit to Mr. Leger and indeed refuses to do so. The

subject matter of this grievance is the issuance of that work permit, and the relief requested by Misco is a direction from this Board that such a work permit be issued.

4. It is not necessary to recount in detail events subsequent to a letter dated January 12, 1982 in detail. Mr. LaBelle went to the M.I.A. asking their advice and help, he was advised that a similar issue was before this Board and that there was no point in filing a grievance until the issue had been resolved in the other case. Once the decision in the similar case was issued on April 29, 1982 the matter was discussed between Mr. McQueen and Mr. Kirki of the M.I.A., and it is clear on the evidence that Mr. McQueen indicated to Mr. Kirki that the permit would be issued in light of the Board's decision. It appears, however that the union continued to refuse and as a result this grievance was filed on July 6, 1982 requesting a work permit for Mr. Leger.

5. Mr. LaBelle makes this request under clause 2.05(a) of the collective agreement between Local 95 and the M.I.A. That clause is part of a larger article, Article 2 in the collective agreement dealing with hiring, and Article 2 reads as follows:

"Article II - Hiring

2.01(a)

The employers shall employ as employees members of the Union in good standing in the performance of all work coming within the scope of this Agreement and shall continue in their employ only employees who are in good standing with the Union.

2.01(b)

All such employees shall be hired through the Union Office except as hereinafter provided.

2.01(c)

The Union shall issue to the Employer a copy of the referral slip issued to the employee for all employees upon hiring, without delay.

2.02

The Union agrees to give preference to and furnish the most competent available employees to the employers on request, provided however, that the Employer shall have the right to determine the competence and qualifications of its employees, and to discharge or refuse to employ, in his sole discretion, any employee for any just and sufficient cause. The employer shall not discriminate against any employee by reason of his membership in the Union or his participation in its lawful activities.

2.03

(Shop Ratio Table)

No apprentice shall execute work unaccompanied by a mechanic except that a fourth year apprentice may execute work on a temporary (not to exceed one (1) working day) emergency basis only when a mechanic is not readily available and the Union business office is

notified. Employers shall have the right to take apprentices already in their employ to out of town locations.

The following Shop Ratio Table notwithstanding, the ratio of apprentices on a job shall not exceed one apprentice to one mechanic except as provided for in Clause 2.04.

2.04

The employers shall have the right to procure workmen from available sources other than from the Union on jobs located within the local jurisdiction when the Union has failed to furnish the required number of competent and qualified employees within two (2) working days following a written request by an employer. Immediately upon hiring, such workmen shall be considered to be emergency help. The employer, after consultation with the Union Business Manager, shall designate the classification within which such emergency help falls, and they shall be entitled to receive hourly rates of pay applicable to such classification. Emergency help shall be issued referral cards for identification and classification only, but shall not come within the scope of this Agreement except as noted in Clause 9.01, and shall be replaced as soon as competent Union employees are available. Emergency help shall not be counted in the ratio for the duration of the emergency.

2.05

An emergency shall be defined as, and shall be deemed to exist, where there is a job situation in which the Union is unable to provide qualified members of the Union on a written request by an employer. If there is any disagreement between the parties concerned as to whether or not an emergency does or does not exist, Article VI will apply.

2.05(a)

An emergency need not be declared to hire new first year apprentices providing the employers shop ratio is in order with Clause 2.03. The Union shall provide these new apprentices with a regular work permit, and without delay.

An emergency can only be declared by an employer and it must be in writing or by telegram.

2.06

It is agreed that members of the Union shall not refuse to work on the grounds that the employer has hired non-union workmen, provided that the provisions of Clause 2.04 have been met by the employer.

2.07

If an employee has been discharged for cause, the reason for discharge shall be in writing to the Union within seven (7) days of

such discharge. Following such notification the employer shall not be required to re-employ this worker. On receipt of such notice by the Union, the Union or the employee may lodge a grievance on the part of the employee which may be processed through the Grievance Procedure provided for in this Agreement, and for this purpose the date when the grievance arose shall be considered to be the date of the receipt by the Union of such notice.

2.07(a)

Union and Association shall be notified in writing of all discharges within seven (7) days of such discharge and state reason for discharge.

2.08

The Union hereby agrees that it will not transfer an employee from one employer to another without the permission of the employer for whom the employee is working at the time.

The employer hereby agrees that it will not transfer an employee from one employer to another without the permission of the Union.

2.09

A member of the Union shall not work at the trade for himself or any other person or shop in the performance of his job as an Asbestos Worker, until he has secured a written referral clearance from both the Union and employer, which must be produced on request.

2.10

The Union and employer will cooperate in placing, on suitable projects, certain senior members of the Union."

The argument on behalf of the applicant is quite simple. The applicant claims that the employer is merely hiring a new first year apprentice while the employer shop ratio is in order. In these circumstances the union should provide the new apprentice with a regular work permit and without delay. Clause 2 of the agreement between Local 95 and the M.I.A. is a very complicated clause, and a different panel of this Board has been called upon to interpret the meaning to be given to clause 2.05(a), (see *Lewis Insulation Services Inc.* [1982] OLRB Rep. April 594). In that decision the Board interpreted clause 2.05(a) in the light of Article 2 as a whole, and found that the clause entitled the employer to hire new first year apprentices. We are of the view that that is the proper interpretation of clause 2.05(a) and it is thus clear that Mr. LaBelle was entitled to hire Mr. Leger as a new apprentice. Since Mr. LaBelle was entitled to hire Mr. Leger, it also follows that the union by the clear language of clause 2.05(a) is required to supply Mr. Leger with the work permit referred to therein and the Board so directs.

0718-82-U United Steelworkers of America, Complainant, V. Montebello Metal Inc., Respondent

Arbitration – Change in Working Conditions – Practice and Procedure – Unfair Labour Practice – Displacing union filing grievances under predecessor union's last collective agreement – Seeking Board order directing employer to appoint arbitrator – Grievances not arbitrable – Board not deferring to arbitration in circumstances – Deciding to hear allegation of freeze period violation

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

APPEARANCES: *Jean Beaudry, Roger Malette, Guy Dallaire and Michael Lynk for the complainant; G. G. Smith and F. McAllister for the respondent.*

DECISION OF THE BOARD; November 10, 1982

1. The complainant has complained that the grievors have been dealt with contrary to the provisions of section 79(2) of the *Labour Relations Act*. The grievors are all of the employees of the respondent in the bargaining unit in a certificate of this Board dated April 13, 1982.
2. The complainant has requested that the Board issue (a) an order compelling the respondent to appoint an arbitrator pursuant to the terms and conditions of employment in effect at the time of its application for certification, and (b) such further and other orders as counsel may advise and the Board considers just and equitable in the circumstances.
3. The complainant has also requested that the Board entertain the complaints and sit as a board of arbitration and at the hearing asked the Board to hear the complaints as being violations of section 79. The respondent opposed the request that the Board sit as a board of arbitration. In addition, the respondent denied it had violated section 79 and argued that the Board ought not to entertain these complaints under section 79.
4. The parties agreed on the following outline of facts. From 1967, until 1982, the Hawkesbury Metal Workers Association (the "Association") has represented certain employees of the respondent. This collective bargaining relationship apparently arose when the respondent voluntarily recognized the Association as the bargaining agent for certain of its employees. Every year or every second year a new collective agreement was negotiated; particularly with respect to monetary and certain other benefits. Towards the end of February of 1982, Mr. Malette of the Association approached the respondent with an urgent verbal request to bargain. Three bargaining sessions were held in February of 1982. On March 1, 1982, the complainant applied for certification and on March 17, 1982, a pre-hearing representation vote was directed. The representation vote was held in April and on April 1, 1982, the collective agreement between the Association and the respondent expired. On April 13, 1982, the Board issued a certificate to the complainant. On May 21 and 22, 1982, the complainant filed two grievances. The first grievance dated May 21 concerned an attendance bonus. The second grievance dated May 22 was with respect to overtime.

5. On May 27, 1982, the complainant in a letter gave written notice to the respondent to bargain under section 14. On June 7, 1982, the complainant requested the respondent to appoint a nominee to a board of arbitration to hear the two grievances dated May 21 and 22, 1982. In a letter dated June 15, 1982, the respondent stated that it was not prepared to appoint a nominee to a board of arbitration and adopted the position that the two grievances were not arbitrable. A third grievance was filed by the complainant on June 15, 1982, and concerns payment for wages for lost working hours to members of the complainant's negotiating committee. The respondent declined to accept this third grievance. On August 6, 1982, the complainant applied for conciliation services but at the time of the hearing a conciliation officer had not been appointed.

6. Section 79(1), (2), and (3) of the Act provides:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees.

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board, as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 14, in which case subsection (1) applies; or

(b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 53 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 44 applies with necessary modifications thereto.

7. In order for the complainant to succeed it must show either that the grievances are arbitrable and that it is the proper party to pursue the complaints to arbitration, or, that the complaints allege violations of the Act and that the Board has jurisdiction to entertain the complaints. All of the grievances were filed after the expiry of the most recent collective agreement between the Association and the respondent. However, before grievances arose the complainant had applied for certification, thereby initiating the statutory freeze on the terms or conditions of employment under section 79(2). This freeze period overlapped with the freeze which came into effect as a result of notice to bargain given by the Association. However, since the complainant was not a party to the most recent collective agreement, the complainant could not, according to one line of arbitral jurisprudence, take the grievances to arbitration under the most recent collective agreement by using the provisions of section 79(3). See the unreported arbitration decision in *Somerville Belkin Industries Limited and Canadian Paperworkers* (Hinnegan), dated October 26, 1981.

8. The freeze under section 79(2) came into force once the application for certification was made on March 1, 1982. Moreover, a freeze arose under section 79(1) once notice to bargain was given on May 27, 1982. These are the two freeze periods relevant to the grievances. It appears from the language of the Act that the two freezes are not identical in scope. Section 79(1) freezes the collective bargaining relationship in the widest possible terms, including the right of both parties to file grievances and proceed to arbitration.

9. In *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49, the Board remarked at page 59, "This freeze [section 70(2)], however, is not as extensive as the freeze under subsection 1, no reference being made to any right, privilege, or duty of a trade union. The freeze under subsection 2 does not contemplate the stabilization of a existing collective bargaining relationship, since none would exist but, rather, the maintenance of the terms of the individual contracts of employment between the employees and the employer."

10. The first two grievances arose after the complainant applied for certification, but before notice to bargain was given. Therefore, such grievances fall within the freeze in section 79(2). The subject matters of those grievances are attendance bonus and overtime pay. On the face of it, these are terms and conditions of employment and/or rights or privileges of the employees which are covered by the freeze. See *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795. The third grievance arose after the notice to bargain was given by the complainant union, and therefore falls within the freeze under section 79(1). This grievance related to lost pay by members of the complainant's negotiating committee. The right to pay during negotiations may not be the right of an employee, but may fall within the right or privilege of a trade union under the freeze in section 79(1).

11. The next question is whether the complainant has the standing to proceed with grievances to arbitration. Since there is no collective agreement in force between the complainant and the respondent there is no arbitration procedure which may be directly pursued. The freezing of the right of the complainant to arbitrate in section 79(1) with respect to the third grievance is of no assistance to the complainant because the complainant did not have the right to arbitrate under the previous collective agreement. The grievance and arbitration provisions under the most recent collective agreement between the respondent and the Association was not imported into the employees' individual contract of employment because those terms of the collective agreement are not directly related to the individual employment relationship. Grievance and arbitration procedures are not strictly matters of individual employment. See *Bell Canada Ltd.*, 17 L.A.C. (2d) 119 at 130. Therefore, the employee's right to arbitration through an agent is not frozen by section 79(2) with respect to the first two grievances. Moreover, the complainant could not apply for expedited arbitration because it is not a party to a collective agreement as required in section 45. See *Milltronics Ltd.*, 30 L.A.C. (2d) 393.

12. In these circumstances, the Board is not prepared to accede to the request of the complainant for the appointment of a nominee to a board of arbitration. If such an order were to be made by the Board it may well be that a board of arbitration would conclude that it did not have the jurisdiction to deal with the grievances because there was no collective agreement in existence.

13. Section 89 confers on the Board the jurisdiction to deal with breaches of the Act. This jurisdiction may overlap with the jurisdiction of a board of arbitration to deal with breaches of a collective agreement when the activity complained of is a breach of both the collective agreement and the *Labour Relations Act*. The policy of the Board in this matter was summarized in *The Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug. 427, where the Board stated at paragraph 4:

Where an alleged unfair labour practice also constitutes at the same time an alleged breach of a collective agreement, the Board has generally chosen to exercise its discretion under section 79 of the Act and defer the matter to grievance arbitration. (See *Collingwood Shipyards* [1967] OLRB Rep. July 376; *Sunnybrook Food Market (Keele) Ltd.* [1972] OLRB Rep. March 210.) However, in exceptional circumstances where the arbitration process is "clearly unavailable or unsuitable to resolving the issue", the Board will depart from its general practice and will itself hear the matter. Examples of such exceptional circumstances include situations where it is alleged that the union has procured the discharge of an employee (*Boivin v. United Ass'n of Journeymen et al* 67 CLLC Para 16,004), where it is alleged that there has been collusion between the union and the employer to the detriment of an employee (*Pitt Street Hotel Ltd.* 63 CLLC Para. 16,275), where it is obvious that a grievance arbitrator cannot provide effective relief (*Imperial Tobacco Products (Ontario) Limited* [1974] OLRB Rep. July 418), and where it is obvious that the interests of an employee will not be effectively represented at arbitration because of a direct conflict

between the interests of the trade union and those of the employee (*Imperial Tobacco Products [Ontario] Limited, supra.*)

The justification for this policy was considered by the Board in *Truck Engineering Limited*, [1977] OLRB Rep. Jan. 2, where the Board stated at paragraph 6:

We do not feel that as a general practice the Board should depart from its general policy of deferring to grievance arbitration. Indeed, we are concerned that should the Board not retain this policy, parties might, in certain instances, seek to characterize issues which relate primarily to the interpretation, application or alleged violation of collective agreements as being violations of the Act so as to allow them to bring such issues before this Board rather than before boards of arbitration. It is clear from a reading of section 37 of the Act that issues which arise out of the interpretation, administration or alleged violation of a particular collective agreement should, as a general matter, be determined by a board of arbitration established pursuant to the collective agreement itself.

14. Another important exception to the presumption of deferring to the jurisdiction of a board of arbitration was made in *Kodak Canada Ltd., supra*, where the Board stated at page 56, paragraph 9:

... Although grievance arbitration is the proper forum for the resolution of matters relating to individual collective agreements, it is the Labour Relations Board that has been entrusted with the responsibility for resolving matters that go to the general structure of collective bargaining in this Province. Where such matters arise, therefore, it is this Board that provides the proper forum for their resolution, and deferral to grievance arbitration can no longer be the appropriate response.

15. Since it has been concluded by this Board that none of the grievances may be arbitrable under the existing circumstances between the complainant and the respondent, the Board is of the view that since the grievances arguably may constitute a violation of section 79 that the Board should hear the complaint in so far as it relates to these grievances. Where a board of arbitration does not have jurisdiction to consider a grievance, it has been suggested by a board of arbitration that the better remedy is to have the matter considered by this Board. See *Re Corning Canada Inc. and United Brewery Workers, Local 304*, 2 L.A.C. (3d) 67 at 71. This line of reasoning was followed by this Board in *Laurentian University of Sudbury*, [1979] OLRB Rep. Aug. 767. In *St. Mary's Hospital, supra*, the Board indicated that the scope of the freeze under section 79(2) covers a wide variety of issues, including both legal and extra legal matters. In that case the Board stated at page 800:

10. Section 70(2) [now section 79(2)] preserves not only the employees' terms and conditions of employment, but also privileges which, by reason of custom and practice, have become a part of the employment relationship. The term "privilege" is extremely broad

and extends to all of those benefits which an employee is accustomed to receiving but to which he is not legally entitled, and which cannot, therefore, be considered a "right". In order to determine whether a particular benefit, or aspect of the employment relationship, has become a privilege, it is necessary to examine the circumstances of each particular case since privileges can arise from established custom, practice, or policy. The question is an evidentiary one for, by definition, the Board's consideration must go beyond the strictly legal incidents of the relationship ("rights") and include those aspects of the relationship which give rise to "privileges."

In conclusion, the Board is prepared to take jurisdiction with respect to these alleged violations of section 79 of the Act.

16. The matter is referred to the Registrar to be listed for continuation of hearing.

2220-81-U; 221-81-R International Beverage Dispensers' and Bartenders Union Local 280 of the Hotel and Restaurant Employees International Union A.F.L. C.I.O. C.L.C., Applicant, V. Movel Restaurants Limited c.o.b. as **Movenpick Restaurants of Switzerland**, Respondent, V. Group of Employees, Objectors.

Bargaining Unit – Employee – Craft unit of bartenders, tapmen and waiters sought – Board policy to limit craft only to persons primarily engaged in serving alcohol – Board not deviating from test to include person serving alcohol but not "primarily engaged" – Whether person undertaking commitment to be trained as manager excluded from unit

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and S. Cooke.

DECISION OF THE BOARD, November 16, 1982

1. In an interim decision the Board directed the consolidation of these two files. With respect to Board File No. 2221-81-R, which is an application for certification the Board found a unit of employees described in the following terms with respect to its inclusive elements, to be appropriate for purposes of collective bargaining:

"All full time and part time tap men, bartenders, beverage waiters and waitresses, bar boys and improvers of the respondent in Metropolitan Toronto."

The Board's reasons for so finding were to be issued at a later date.

2. The interim decision also authorized a Board Officer to inquire into and report to the Board on the list of employees and the composition of the bargaining unit because the parties were disagreed as to who should be included in the unit as described above.

3. Following the Board's decision, the parties signed a consent agreement resolving the issues in Board File No. 2220-81-U, as a result of which that complaint was withdrawn by leave of the Board. The terms of the consent agreement included agreement that three persons, Casey Arnott, Clive McGregor and Dean Northcott were included in the bargaining unit described above. It also included the agreement that two persons, Pamela L. Stroh and Janet McQuattie, should be examined by the Board Officer to determine whether they were to be included in or excluded from the unit. The applicant was contending that neither of them were primarily engaged in the handling and serving of alcoholic beverages, the standard which the Board customarily applies to decide who is in the unit described. The applicant contended also that Stroh exercised managerial function within the meaning of section 1(3)(b) of the *Labour Relations Act*. The respondent was holding the contrary positions.

4. The examination of the duties and responsibilities of Stroh and McQuattie was completed and a hearing was held for the purpose of receiving the submissions of the parties with respect to the Officer's report and to deal with any other outstanding matters arising out of or incidental to the application for certification. The Board heard the submissions of the parties on the officer's report. In the course of those submissions, counsel for the applicant conceded that the two employees were primarily engaged in the handling and serving of alcoholic beverages, but continued to assert that Stroh exercised managerial function.

5. Applicant counsel argued that Stroh had committed herself to be part of management by entering into a contract in which she accepts to be transferred outside of Canada with the respondent's organization for training in the food services industry, a contract characterized by counsel as a management training contract. Having allied herself with management, counsel contends that she should be excluded from the bargaining unit.

6. The Board, after recessing the hearing to consider the parties' submissions, rendered the following oral decision which is hereby confirmed:

- (a) There is no evidence in the Board Officer's report with respect to the Board's usual criteria for determining the exercise of managerial function which would support a finding that Stroh exercises managerial functions within the meaning of section 1(3)(b) of the Act.
- (b) Even were the Board to accept the proposition that an employee who has committed himself or herself to a management development direction should be excluded from a unit of employees appropriate for collective bargaining, and it does not accept the proposition, the evidence before the Board falls far short of establishing that Stroh has made such a commitment.

- (c) Therefore Stroh does not exercise managerial function within the meaning of the Act and, since the parties are agreed that she and McQuattie are primarily engaged in the handling and serving of alcoholic beverages, Stroh and McQuattie are in the inclusive part of bargaining unit described in paragraph 8 of the Board's interim decision. Thus there are a total of five persons included in that unit: Casey Arnott, Clive McGregor, Janet McQuattie, Dean Northcott and Pamela Stroh.

7. It remains now for the Board to set forth its reasons for finding that the inclusive part of the appropriate bargaining should be described as shown in paragraph 1 herein.

8. The respondent operates a restaurant establishment in Toronto called Movenpick Restaurants which is comprised of several food and beverage service areas: the Movenpick Restaurant; the Grape 'N Cheese; the Rossli; the Verandah ("the Deli") and two patios. All of these areas are covered by dining lounge licenses for the sale of alcoholic beverages. The parties are agreed that the current liquor license regulations stipulate that sales revenue from liquor sales compared with sales revenue from food sales cannot exceed 60/40 ratio under a dining lounge license.

9. Alcoholic beverages sold consist of selections of beer, wine and mixed drinks and they are served from two areas, a service bar located in the kitchen area and the Grape 'N Cheese, a wine bar. This latter area is staffed by two bartender/waiters who prepare drinks for the customers of the Grape 'N Cheese and for the waiters serving food and beverages to the Rossli patrons. The Rossli is the most formal dining area. Except for the two bartender/waiters in the Grape 'N Cheese, the serving of alcoholic beverages is done by the waiters, male and female, who also provide the food service. The two Grape 'N Cheese staff serve food to their customers as well. During the lunch hour a cook who prepares and serves the food to customers at the dining counter in the Movenpick Restaurant serves some alcoholic beverages to customers also. The alcoholic beverages served from the service bar are prepared by the three bartenders who staff it and are picked up there and delivered to the customers by the waiters.

10. The five employees named in item (c) of paragraph 6 as being employees in the bargaining unit include the 3 service bartenders and the two bartender/waiters in the Grape 'N Cheese. The applicant seeks to represent as well all of the waiters who serve alcoholic beverages in the various restaurants of the establishment and contends that they together with the other five comprise a craft unit within the meaning of section 6(3) of the Act. That section provides as follows:

Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining such skills or craft, and the Board may include in such

unit persons who according to established trade union practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

As the Board pointed out in its decision in *Orangeroof Canada Limited*, [1974] OLRB Rep. Nov. 761, in order for a trade union to bring itself within the mandatory provisions of the section and be certified for a craft unit it must establish that:

- (1) the group of employees concerned exercise technical skills or are members of a craft by reason of which they are distinguishable from other employees;
- (2) the group of employees concerned commonly bargain separately and apart from the other employees through a trade union that, according to established trade union practice, pertains to such skills or craft;
- (3) the application is made by a trade union pertaining to such skills.

If those three prerequisites are satisfied then the Board is mandated to deem the unit appropriate for collective bargaining purposes.

11. The Board for many years has recognized the applicant as a trade union which represents a craft comprised of tapmen, bartenders, beverage waiters, bar boys and improvers. It has been the consistent and long established practice of the Board to describe a bargaining unit comprised of that craft as "all full-time and part-time tapmen, bartenders, *beverage* waiters, bar boys and improvers" (emphasis added) whenever the applicant has applied for certification for employees of hotel beverage rooms, liquor lounges and dining rooms in the Toronto and Oshawa areas. Thus when the applicant applies to be certified for a unit described in those terms it satisfies the three prerequisites of section 6(3) and the Board has consistently deemed that unit to be appropriate for collective bargaining as it is mandated to do by the section. See *Cederbrae Hotels and Homes Ltd., carrying on business as the Thunderbird Motor Hotel*, [1973] OLRB Rep. Jan. 44 and *Seaway Hotels (Ontario) Limited*, [1976] OLRB Rep. Nov. 676. As those cases reveal, the mandatory nature of section 6(3) takes precedent over the Board's usual criteria for determining appropriateness under section 6(1). See also paragraphs 11 and 12 of the Board's decision in *Orangeroof, supra*.

12. The Board has always defined the parameters of this craft unit by application of a "primarily engaged" test; that is for a person to be included in the unit, he must be primarily engaged with handling and serving alcoholic beverages. This is usually determined by the focus of the room and whether it is maintained primarily for serving food or alcoholic beverages. See *Seaway Hotels (Ontario) Limited*, [1976] OLRB Rep. March 99. The unit proposed in the application (paragraph 5 of the interim decision), while similar to the standard unit in most respects, omits the modifying word "beverage" in the term "beverage waiters". The Board's decisions which deal with disputes over

what persons are captured by the standard craft unit description reveal that it is the work performed by waiters which is invariably in dispute.

13. That is precisely the situation herein. Applicant counsel told the Board that the unit proposed in the application, which is described as follows: “All full-time and part-time Male and Female Bartenders Tapman Waiters Bar-boys Improvers Beer Operators in the employ of the Respondent . . .”, described the applicant’s standard craft unit according to its established collective bargaining practice. Counsel contended that the “craft” represented by the applicant included any person handling and serving alcoholic beverages or “incidentally but essentially involved” in the serving of such beverages. Therefore a unit comprised of that “craft” satisfied the three prerequisites which mandate the Board to grant a craft unit. Counsel argued in the alternative that the Board should exercise its discretion under section 6(3) for including in a craft unit” . . . persons who according to established trade union practice are *commonly associated in their work and bargaining* with such [a] group . . .” (emphasis added) so as to include in the craft unit waiters who are associated with the craft by being “significantly involved in or necessarily incidental to” the serving of alcoholic beverages.

14. Counsel for the applicant argued that the primarily engaged test was adopted and used by the Board to assist it in defining the limits of the craft in circumstances where the applicant was seeking to “carve out” beverage rooms and liquor lounges from other parts of a hotel operation. That, counsel asserts, is the context with which the Board’s decisions were dealing when it has applied the primarily engaged test, not in the context of a restaurant separate and distinct from any hotel operation. Counsel contends the test is no longer appropriate today, and particularly is not appropriate in “upbeat” restaurants where food can or must be served together with alcoholic beverages.

15. The Board heard the evidence of Frank Cortese, secretary-treasurer and business agent of the applicant, given in support of the applicant’s claim that its traditional craft unit included waiters who served food and alcoholic beverages and that it represented these waiters in collective bargaining together with persons in the other classifications in the craft, without regard for whether the waiters were primarily engaged in serving alcoholic beverages. His evidence-in-chief included evidence of certificates for four establishments were issued to the applicant by the Board in which the bargaining unit is described in terms identical with or closely similar to the unit the applicant is seeking here. These certificates are described to apply to persons employed at the Nags Head Tavern in Eaton’s Centre, the Brunswick Tavern, The Normandy Room of the Cloverleaf Hotel and Sammy’s Exchange Restaurant in the Toronto-Dominion Centre, all in Metropolitan Toronto. His evidence was that the waiters who served both food and beverages were included in the unit and represented in collective bargaining by the applicant. He stated that the Normandy Room was a dining room which operated under a dining room liquor license.

16. Cortese gave evidence as well that the applicant currently represents waiters who serve both food and alcoholic beverages in the Roland Emmett Lounge of the Park Plaza Hotel, the New Gregory House and the Strathcona hotel and had represented waiters in similar functions at the Colonial Tavern and the Westminster Hotel when they were in business. In addition to these establishments, according to Cortese’s evidence-in-chief, the applicant represents waiters in 28 other establishments pursuant

to a master agreement with the Hotel Association of Metropolitan Toronto. These waiters serve both food and alcoholic beverages.

17. In his cross-examination Cortese acknowledged that the Hotel Association collective agreement describes its scope in terms of the "beverage departments" of the covered establishments and refers to waiters as "beverage waiters". Approximately 80 other establishments have agreed to be bound by that agreement and another 30 are bound to individual agreements having the same or similar scope clauses. The Roland Emmett lounge of the Park Plaza Hotel is covered by one of these individual agreements. That agreement, which was put into evidence during cross-examination, is between the operators of the hotel and the applicant. Its scope clause describes the unit in terms of persons employed by the employer "... as tapmen, bartenders, beverage waiters, bar-boys and improvers in the cocktail lounges and lounge service bars at the Park Plaza Hotel as well as room service waiters ...". Cortese was unable to tell the Board whether waiters other than beverage waiters were covered by the agreement and there is no evidence with respect to room service waiters. It was his evidence that the collective agreements which apply, or had applied to the New Gregory House, Colonial Tavern, Strathcona Hotel and Westminster Hotel would have had the same scope as does the Association agreement.

18. Cortese did not know whether any certificates other than the four in evidence had been issued to the applicant during the two years prior to this application. The dates of the four certificates show them to have been issued June 7, 1978; August 5, 1980; January 6, 1981 and February 23, 1981. He admitted in cross-examination that the certificate which was issued to the applicant for the Nags Head Tavern was for the employees of the liquor lounge and the waiters he referred to in chief were the liquor lounge waiters, all of the other waiters "had been taken" by the applicant's sister Local 75 which also represents all other employees such as kitchen staff and caretakers. His evidence is that Local 75 must organize everyone including dining room waiters, kitchen staff, everyone in the house except for the applicant's craft. He did not know if the bargaining units in the three other certificates had been determined by agreement of the respondent. The certificates contain the statement that:

"This certificate is to be read subject to the terms of the Board's decision(s) in this matter and, accordingly, the bargaining unit described herein is to be read subject to any qualifications referred to in the said decision(s) of the Board."

The Board record shows that the bargaining units in the three certificates were determined by the Board "having regard to the agreement of the parties".

19. Applicant counsel's contention that the Board should recognize the "craft" represented by the applicant as including any person handling and serving alcoholic beverages or "incidentally but essentially involved" in the serving of such beverages is tantamount to asking the Board to find that there is another grade or level of craft employees; those who handle alcohol to some extent but not to the extent that they are primarily engaged in handling it. The same may be said about counsel's alternative proposition that the Board exercise its discretion under section 6(3) of the Act to make those persons part of the craft unit. What counsel is asking the Board to do is to extend

the reach of the craft unit which it usually determines for the applicant under section 6(3) absent agreement of the parties to a different description. Counsel characterized her argument in terms of a need to shift the locus of the “bright line” now drawn by the Board’s primarily engaged test between the applicant’s normal craft and waiters who have some involvement with handling alcoholic beverages, to be drawn between dining room waiters and kitchen staff, and in a hotel operation, other hotel staff.

20. In other words counsel is asking the Board to extend the reach of the craft unit so as to include all beverage and food service staff involved with any handling of alcoholic beverages. In addition, when the application came back on for hearing after the Board’s interim decision had issued and to hear the parties’ submissions on the officer’s report, counsel argued for the Board to consider factors such as the amount of time and effort expended by waiters in the handling of alcoholic beverages as part of the test for deciding who would be included in the craft unit. This position was argued in the context of the need for clearer direction to the applicant for its guidance in knowing what employees of an establishment it can organize if it is to be certified for its craft.

21. One of the effects of shifting the locus of the “bright line” as argued by counsel would be to enable the applicant to organize into its craft unit, for example, dining room waiters who handle alcoholic beverages but would exclude busboys who do not. One presumes that they would be left to be organized by the applicant’s sister local along with kitchen staff and, if the establishment was a hotel, other hotel service staff. Counsel submits that this position is supported by the Board’s decision in *Victoria Hotel*, [1980] OLRB Rep. Feb. 270. That decision deals with an application for certification by the same applicant herein. Counsel claims that case stands for the Board saying that the applicant must take into its craft persons who are necessarily incidental to the serving of alcoholic beverages even if they do not actually handle alcoholic beverages. With due respect, the decision says nothing of the kind.

22. The applicant, which already represented persons employed in its standard craft unit at the hotel, was seeking to represent waiters, male and female, in only one of two dining rooms in the hotel. The respondent contended that the appropriate bargaining unit should include all employees in both dining rooms. The respondent was not contending that the units should include other hotel staff as well and the applicant clearly was not seeking to represent them. It is clear from the decision, particularly paragraph 9, that the Board considered the parties to be agreed on that exclusion and went on in paragraph 10 to describe one bargaining unit of all full-time employees and one of all part-time employees, but each one covering *both* dining rooms. In the process, it included busboys in the unit even though the applicant was seeking to exclude them because, unlike the barboys in the applicant’s normal craft unit, busboys did not handle alcohol at all and by that fact were distinguishable from the waiters. The Board’s reasons for rejecting the applicant’s argument is set out in paragraph 9 of the decision:

9. The Board has always applied a “primarily-engaged test” in defining the limits of the applicant’s beverage-employee craft unit. (See *Seaway Hotels (Ontario) Limited*, [1976] OLRB Rep. May 99; *Cederbrae Hotels and Homes Limited*, [1973] OLRB Rep. Jan. 44; *Caswell Hotel (Sault) Limited*, [1971] OLRB Rep. July 446.) The

applicant's argument on the busboys really depends upon the Board finding a second stratum of craft employees, being those employees who, while not primarily engaged to serve alcohol, handle alcohol to some extent. The Board has never gone that far, however, and indeed noted particularly in the *Cederbrae Hotels* case, *supra*, that the craft unit normally granted to the applicant is largely the result of the mandatory nature of section 6(2) of *The Labour Relations Act*, and is granted on that basis notwithstanding the strong community of interest the members of that craft share with other employees in a hotel. In fact, concern was expressed over this phenomenon in the *Seaway Hotels (Ontario) Limited* case, [1976] OLRB Rep. Nov. 676, in particular in the concurring opinion of A.S. Gribber. The Board finds no basis for the recognition of a second craft-group composed of waiters and waitresses, as urged by the applicant in the present case. Indeed, in terms of fragmentation (and in the absence of the agreement of the parties as we have here), there may be some question as to the appropriateness of limiting a bargaining unit only to persons employed in the dining rooms of a particular hotel. We mention this only to ensure that the applicant is not taken by surprise should this issue arise in any subsequent case.

23. The evidence put forward by the applicant in support of its argument that its normal craft has grown to include waiters who serve both food and alcohol but are not primarily engaged in the serving of alcohol falls far short of persuading the Board that that has happened. Its evidence in chief with respect to the Nag's Head Tavern was obviously intended to convey the impression that all of the servicing of both food and alcohol was done by the waiters whom it represented. Cross examination revealed that the applicant only represented its normal craft and that a sister local represented other staff, including other waiters. The bargaining units in the other three certificates recognize that the parties were agreed to a description which appears to be different from the normal craft unit and the Board accepted their agreement. No collective agreements with those three employers and no other evidence as to the scope of the applicant's collective bargaining with them was put before the Board to establish the actual scope of the applicant's bargaining units. The evidence is that for more than 100 establishments with which the applicant has agreements, separate from the establishments covered by the Association agreement, the bargaining unit is described by reference to the "beverage department" of the establishments and to include beverage waiters. It is reasonable, therefore, to infer that the establishments included in the three certificates covered in a similar fashion. Use of the terms "beverage department" and "beverage waiter" are entirely in keeping with the applicant's normal craft. In the absence of evidence which would persuade the Board that the employees covered by those agreements and by the Association agreement include persons who are *not* primarily engaged in the handling and serving of alcoholic beverages, the Board is of the view that the evidence is more supportive of a finding that the preponderance of employees represented by the applicant are those engaged in its normal craft.

24. For that reason the Board rejects the applicant's first submission that its craft includes persons who serve alcoholic beverages but are *not* primarily engaged in serving alcohol. For the same reason, the Board is not persuaded that it is the

established practice of the applicant to represent such persons in collective bargaining so as to cause the Board to exercise its discretion under section 6(3) to include them in the craft unit. In other words, the Board is not persuaded that waiters who serve alcoholic beverages but are not primarily engaged to do that are "... persons who according to established trade union practice are commonly associated in their work and bargaining ..." with the applicant's normal craft group.

25. For similar and additional reasons the Board does not agree that the locus of the "bright line" defining the reach of the craft unit should be shifted so as to include waiters not primarily engaged in serving alcoholic beverages. The Board has previously expressed its concern over the incursion of this craft unit into the strong community of interest between persons engaged in its craft unit and other persons engaged in other work in licensed establishments and the hotels in which they frequently are based. See paragraph 9 of the *Victoria Hotel* decision quoted above. There is no evidence before this Board which would cause it to extend that incursion. Moreover, as far as the claimed need for clarity of who to organize, the applicant already has that guidance from the primarily engaged test as it has been applied in cases such as the decisions referred to in paragraph 9 of the *Victoria Hotel* decision, *supra*. If the applicant wishes to organize and represent employees beyond its normal craft lines, there is nothing in the Act to prevent it from organizing employees who would constitute an appropriate unit under section 6(1) of the Act. It is inhibited from doing so by the conditions governing relationships within its parent international union, the resolution of that problem is in its own hands.

26. For all of the above reasons the Board finds that all full-time and part-time tap men, bartenders, beverage waiters, bar boys and improvers of the respondent in Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

27. The Board is satisfied that less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on February 4th, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

28. Therefore, as the parties were advised orally at the hearing, this application is dismissed.

0950-82-R Labourers' International Union of North America, Local 837, Applicant, v. – **Ninco Construction Ltd.**, Respondent,

Bargaining Unit – Construction Industry – Unit sought by applicant including employees within and outside its designation – Resulting in provincial agreement covering some unit employees but not others – Board finding unit inappropriate – Board not recognizing cement finishing, waterproofing or restoration as separate trades

BEFORE: Ian Springate, Vice-Chairman, and Board Members I. M. Stamp and C. A. Ballentine.

APPEARANCES: *B. Fishbein, D. McGregor and D. Strang for the applicant; No one appearing for the respondent.*

DECISION OF THE BOARD; November 8, 1982

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 6, 1978, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council.
3. The respondent is engaged on a project in the City of Hamilton. According to the applicant, on the date of the filing of the application, the respondent employed a number of carpenters, construction labourers and certain employees doing cement finishing work. At times the respondent also employed both rodmen and equipment operators, although apparently no employees within these two classifications were at work on the application date. At the hearing, counsel for the applicant requested that the bargaining unit be described to encompass the industrial, commercial and institutional sector (the "ICI sector") as well as the other sectors of the construction industry and also that the unit be described in terms of all trades in the respondent's employ in Board Area #26. The labourers' employee bargaining agency has not been designated to represent carpenters, rodmen or equipment operators.
4. In *Clarence H. Graham Construction Limited* [1981] OLRB Rep. Sept. 1195, the Board considered a request by the United Brotherhood of Carpenters and Joiners of America that it be certified to represent a bargaining unit comprised of carpenters and carpenters' apprentices as well as a second bargaining unit comprised of construction labourers, bricklayers and bricklayers' apprentices. Both of these requested units would have encompassed the ICI and other sectors of the construction industry. After reviewing the provisions of the Act relating to the regime of provincial bargaining in the ICI sector, the Board concluded that the only appropriate bargaining unit was one described in terms of carpenters and carpenters' apprentices. It is clear that in reaching this conclusion the Board took into account the fact that while the carpenters union is included in the ICI scheme of provincial bargaining, any construction labourers and

bricklayers represented by the union would be excluded from the provincial bargaining scheme and hence not be covered by any provincial agreement. The Board commented on this possibility as follows:

“To certify the applicant in the present case for employees in the industrial, commercial and institutional sector in the construction industry, but outside the scheme of provincial bargaining would create representational rights for trade unions within that scheme for employees outside the regime of provincial bargaining. Such representation would clearly be disruptive of the overall scheme contemplated in sections 125 to 136.

5. The contention of the applicant is that in the *Clarence H. Graham* case the Board misinterpreted the relevant provisions of the Act and wrongly concluded that it was prohibited from certifying an affiliated bargaining agent for employees falling outside the scope of the relevant designation. Accordingly, contends the applicant, the Board should not follow the reasoning set forth in that case. We incline to the view that section 144 of the Act does not permit an affiliated bargaining agent to apply to represent employees in the ICI sector who are outside the scope of the designation affecting it. However, even assuming that the Act does not actually prohibit such a result, we nevertheless regard the unit being requested here, (namely one which includes employees both within and outside the regime of provincial bargaining such that some but not all of the employees would fall under a provincial agreement) to be disruptive of the scheme of provincial bargaining and not appropriate for collective bargaining. The Board has a broad general authority under section 6(1) of the Act to determine the unit that is appropriate for collective bargaining. In the ICI sector this broad authority is restricted somewhat by section 144. Nothing in section 144, however, mandates that the Board include different crafts or classes of employees within the same bargaining unit or requires that employees within and outside the scheme of provincial bargaining be included in the same unit. Accordingly, even if such a unit is permitted under the Act, nevertheless the Board still retains the authority under section 6(1) to conclude that it is inappropriate. As already indicated, we view the unit being requested in this case as inappropriate. Instead, we regard the appropriate bargaining unit as one which encompasses only employees covered by the labourers' employee bargaining agency designation and who, accordingly, would fall under the labourers' provincial agreement.

6. At the hearing, counsel for the applicant contended that any bargaining unit fashioned by the Board should expressly include not only construction labourers but also “all employees engaged in cement finishing, waterproofing or restoration work”. This phrase is utilized in both the labourers' employee bargaining agency designation and the labourers' provincial agreement. Presumably the phrase found its way into the designation because of its use in collective agreements entered into by various Ontario locals of the Labourers' International Union prior to the advent of provincial bargaining. To our knowledge, except for displacement applications where the wording had previously been utilized by the employer and the incumbent union, the Board has never recognized employees engaged in cement finishing, waterproofing or restoration work as being one or more separate trades or classifications of employees for certification purposes. Indeed, the Board's experience is that the types of work involved can, and

have been, performed by members of more than one trade. We are not satisfied on the material before us that the Board should now begin to describe bargaining units in these terms. However, in that on the application date the respondent did have employees engaged in cement finishing work, we think it appropriate to describe the bargaining unit in terms of construction labourers but to specify in a clarity note that employees performing this type of work do come within the scope of the bargaining unit. In that the respondent had no employees engaged in waterproofing or restoration work at the relevant time, we do not feel it appropriate to include a similar clarity note relating to this type of work.

7. Having regard to the above reasoning, and to the provisions of sections 6(1) and 144(1) of the Act, the Board finds that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

8. For the purposes of clarity, the Board notes that employees engaged in cement finishing work are included in the bargaining unit.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 27, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the *bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(emphasis added)

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of

Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

11. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the institutional, commercial and industrial sector, save and except non-working foremen and persons above the rank of non-working foreman.

0931-82-JD The International Association of Machinists and Aerospace Workers, Complainant, v. **Ontario Hydro** and United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Respondents

Jurisdictional Dispute – Dispute over set-up and operation of horizontal boring mill between UA and Machinists union – Board applying criteria and confirming assignment to UA

BEFORE: D. E. Franks, Vice-Chairman, and Board Members C. G. Bourne and H. Kobryn.

APPEARANCES: *George Drennan, Alexander Walker and Ches Tuck for the complainant; W. O'Neill and A. Mollica for Ontario Hydro; Alex J. Ahee and Chris Burrows for the United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada.*

DECISION OF THE BOARD; November 23, 1982

1. This is a complaint under section 91 of the *Labour Relations Act* wherein the complainant, International Association of Machinists and Aerospace Workers (hereinafter referred to as the “Machinists”) complain that certain work has been assigned to members of the respondent, United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada (hereinafter referred to as the “U.A.”).

2. The work in dispute in the present complaint is the set-up and operation of a Horizontal Boring Mill at the Darlington Construction site so far as it concerns the preparation and fabrication of pipe. The work in dispute, therefore, concerns the operation of a single machine. That machine is located in a pipe fabrication shop on the Darlington Generating Station site of the respondent Ontario Hydro. The pipe fabrica-

tion shop contains a number of large machines which are concerned with the fabrication of pipe units for installation at the Generating Station. The Horizontal Boring Mill in question is a rather large piece of machine equipment with the horizontal bed being approximately twenty-eight feet in length. The use of the mill in the pipe fabrication shop is limited exclusively to the preparation of pipe ends prior to welding in the fabrication shop. The pipe is placed on the bed of the machine and the tool bit attached to the rotating mill face then cuts material from the end of the pipe until the desired configuration has been obtained on the pipe end. The pipe end having been finished by the Horizontal Boring Mill, the pipe is then transported to other pieces of equipment in the fabrication shop which then weld the pipe into various shapes.

3. The respondent, Ontario Hydro, assigned the work to members of the U.A. In fact, Ontario Hydro assigned all of the work in the pipe fabrication shop to members of the U.A. There are on the same site two other "shops", a machine shop and a "rebar threading shop", both of which are manned by the machinists. The machinists are primarily located in the machine shop but when work is to be done in the "rebar shop", a machinist goes to that shop. The Machinists are party to a collective agreement with Ontario Hydro covering machinists on construction work sites. Under that collective agreement the Machinists filed a grievance alleging a violation of section 1.3 of the Agreement. That article reads as follows:

"1.3 (*REV*)

The bargaining unit under this Agreement shall comprise all Machinists, Machinist Welders, Machinist Millwright-Turbine Erectors, Equipment Repair Machinists, Drill Doctors, Conveyor Mechanics, Machinist Helpers, Machinist Apprentices and Auto and Diesel Mechanic Apprentices employed by the Generation Projects Division and the Lines and Stations Construction Department of the Transmission Systems Division of the Employer, excepting those described hereunder;

- (a) persons above the rank of working foreman
- (b) employees whose headquarters and usual places of work are Head Office and the Ontario Hydro Service Centre
- (c) field employees in the Generation Projects Division and the Lines and Stations Construction Department of the Transmission Systems Division who, at April 30, 1953, possessed full regular status."

Simply put, the claim of the Machinists is that the Horizontal Boring Mill is a machine typically found in a machine shop and operated by machinists.

4. The position taken by the respondent, Ontario Hydro, was a neutral one between the two unions, except with respect to matters relating to the economy and efficiency of the operation.

5. In complaints under section 91 the Board has developed a set of criteria on which the determination of the proper assignment of work in question is based. These

criteria, (see, for example, *Anchor Shoring Limited* [1974] OLRB Rep. Aug. 528) fall into the following headings: collective bargaining relationships, skill and training, economic consideration, employer practice, and area practice. We will, therefore, deal with the evidence presented to the Board in this matter under these various headings.

6. *Collective Bargaining Relationships* – In the present case the respondent Ontario Hydro has collective agreements with both the respondent U.A. and the complainant Machinists having worked on construction sites. Under both collective agreements the two competing unions claim jurisdiction over the work. In such circumstances, the fact of a collective agreement and the jurisdictional claims that arise under those agreements are not factors established in jurisdiction for either of the two competing trade unions.

7. *Skill and Training* – As noted above, the Horizontal Boring Mill which is the piece of equipment which gives rise to this complaint is typically a machine found in a machine shop. In large measure, the basic thrust of the complainant's case was that machinists are trained and have the necessary skills to operate this piece of equipment. In support of this claim, the complainant relies on the certification under the *Apprenticeship and Tradesmen's Qualification Act* of machinists and the curricula developed thereto relating to the training of machinists. Indeed, there can be no doubt that in terms of the general operation of such a tool, the complainant union would normally represent people having skills and training required to operate such a piece of equipment.

8. However, in the circumstances of the present complaint, the skills pertaining to the general operation of a Horizontal Boring Mill are not necessary. It is clear on the facts of this case that the Boring Mill is used for a very limited purpose and its operation is clearly a routine operation. Thus, while in normal circumstances the criteria of skills and training would normally favour the Machinists requesting an assignment of such work, in the present circumstances, they do not create an advantage over the U.A. in the present situation. Indeed, there is evidence that the respondent U.A. has at this job site and at other job sites been capable of supplying members to work in the fabrication shops and operate this or similar pieces of equipment.

9. *Economic Considerations* – The position taken by the U.A. is that the operation of the Horizontal Boring Mill could be performed by one of the group of tradesmen working in the pipe fabrication shop. The position of the complainant Machinists is that the operation of that mill, in terms of the economics of the matter is no different from the operation of the equipment in the rebar threading shop on the Darlington Generating job site. Thus, when the equipment in that shop requires operation, a machinist goes from the machine shop over to the rebar threading shop to operate the equipment there. The view of the Machinists is that with respect to the Horizontal Boring Mill a machinist stationed in a machine shop could walk over to the pipe fabrication shop to operate the Boring Mill.

10. It is at this point that the respondent Ontario Hydro expressed a preference for an assignment to the Plumbers Union. Their position was quite simply that the working time lost by machinists while walking from the machine shop to the pipe fabrication shop was an economic consideration that favoured an assignment to the U.A. Clearly, in their view, the operation of the Horizontal Boring Mill is not a full time operation, and that the most economic arrangement of the work favoured the assignment to a member

of the U.A. working in the pipe fabrication shop, and operating this piece of equipment as well as other pieces of equipment in that shop.

11. We are of the view that the economic considerations raised by the respondent Ontario Hydro clearly favour an assignment of work to the U.A. rather than to the complainant, Machinists Union.

12. *Employer Practice* – The position taken by the U.A., on the basis of the evidence before the Board, is that on other generating station sites where there has been a pipe fabrication shop, all the work in that shop including the operation of Horizontal Boring Mills has gone to members of the U.A. This evidence was contested by the Machinists, but was not rebutted. Therefore, it is our conclusion that employer practice is a criteria which also favours the respondent United Association.

13. *Area Practice* – In the present case this is not a factor that can be considered largely because of the uncommon occurrence of large capacity Horizontal Boring Mills in on site fabrication shops. Therefore, this factor favours neither of the competing unions.

14. Having regard to the various criteria, it is clear in the present case that those criteria favour an assignment of work to the respondent U.A. Since the assignment has been made by the respondent, Ontario Hydro, to the U.A. we therefore confirm that assignment and, accordingly, the present complaint is dismissed.

0452-82-R Canadian Union of Public Employees, Applicant, v. The Corporation of the City of Ottawa, Respondent

Build-Up – Practice and Procedure – Pre-Hearing Vote – Reconsideration – Respondent raising build-up and challenging ballots under section 70(2) – Board rejecting respondent's positions after conducting hearing – Respondent's attempt to relegate matters under section 70(3) denied – Board finding circumstances not appropriate for use of Board's reconsideration power

BEFORE: R. D. Howe, Vice-Chairman, and Board Members L. Hemsworth and S. Cooke.

APPEARANCES: *John Elder and Ginette Thibert for the applicant; J. Bellomo, D. Gamble, S. Keith and J. Cyr for the respondent.*

DECISION OF THE BOARD; November 23, 1982

1. The purpose of this decision is to record and confirm an oral decision given by the Board at the November 18, 1982 hearing of this matter, following a recess during which the Board reviewed and considered the submissions of the parties. That oral decision is set forth in the remaining paragraphs of this decision.

2. This is an application for certification in which the Board, differently constituted, directed by decision dated June 22, 1982 that a pre-hearing representation vote be taken in the following unit, which the parties agreed to be an appropriate voting constituency and bargaining unit at the pre-hearing vote meeting held on June 16, 1982 concerning this matter:

“All employees of the respondent in the City of Ottawa regularly employed for not more than twenty-four hours per week, save and except students employed during the school vacation period.”

3. Pursuant to that direction, a pre-hearing vote was taken on July 6, 1982, in which 52 ballots were cast, including 41 segregated ballots. At the completion of the vote, the ballot box was sealed and the matter was subsequently listed for hearing in Ottawa on September 7, 1982 for the purpose of hearing the evidence and submissions of the parties with respect to all matters arising out of and incidental to this application. At that hearing, the respondent, through its counsel, requested the Board to direct that a further representation vote be taken on the basis of what he characterized as an expected “build-up” of the work force in the bargaining unit. At that hearing, the respondent also presented evidence and argument in support of its contention that none of the 41 segregated ballots should be counted. (Through a “Statement of Desire to Make Representations” dated July 13, 1982, filed with the Board pursuant to section 70(2) of the Board’s Rules of Procedure, the respondent had duly notified the Board of its intention to raise those issues at that hearing.) In a decision dated September 9, 1982, the Board disposed of those issues as follows:

“3. At the hearing in this matter, counsel for the respondent asked the Board to direct that a second, deferred representation vote be taken on the basis of what he characterized as an expected ‘build-up’ of the work force in the bargaining unit. However, the circumstances of this case do not justify setting aside the pre-hearing representation vote that has already been taken, or directing that a further vote be taken. As noted by the Board at the hearing of this matter, this is not a ‘build-up’ case; rather, it is a case in which the ‘part-time’ bargaining unit is subject to seasonal fluctuations, the effect of which is somewhat accentuated by the fact that the parties have agreed to the exclusion of ‘students employed during the school vacation period’. The approach which the Board had generally adopted in such situations is described as follows in *Filkon Food Services*, [1981] OLRB Rep. Dec. 1771 (application for reconsideration dismissed, [1981] OLRB Rep. Dec. 1772) in which the Board wrote (in paragraph 4):

‘... the Board has consistently refused to take into account seasonal fluctuations in a work force from the point of view of either ‘build-up’ or bargaining unit configuration, outside of certain historically-recognized industries such as canning and tobacco-harvesting (see *Universal Cooler*, [1967] OLRB Rep. Sept. 546, and *Melnor Manufacturing Ltd.*, [1976] OLRB Rep. May 215). The Board in most instances, in other words, does

not take into account the normal ebb and flow of the work force.'

There is nothing in the circumstances of this case which would prompt the Board to adopt a different approach in this context.

4. Eight of the 41 segregated ballots were cast by persons whose names do not appear on the voters' list (including two persons, P. Burke and C. J. Shoihet, whose names were originally on the list but were removed by reason of the termination of their employment prior to the date of the vote). Having regard to the agreement of the parties that those persons were ineligible to vote, the Board directs that those eight ballots not be counted.

5. Counsel for the respondent contended that none of the other 33 segregated ballots should be counted because (in his submission) they were cast by 'students employed during the school vacation period'. The only evidence called by the respondent in support of that submission was the testimony of Personnel Officer Robert Dehler, who told the Board that although those 33 persons were regularly employed for not more than twenty-four hours per week as of the date of the application (and also as of the terminal date), by the date of the vote they had been 'transferred to summer employment' and had become 'summer employees' who work more than thirty hours per week. In response to questions put to him by the Board, Mr. Dehler stated that the 'majority' of the 'summer employees' are students, but that 'some of them' might be non-students who have other full-time jobs 'somewhere else' during other seasons of the year. No evidence was adduced from which the Board can discern which of the 33 individuals in question are 'students' and which are not. Thus, in view of the rather vague and unsatisfactory evidence which was placed before us concerning that issue, the respondent has not satisfied the onus which rests upon it of establishing its contention that those 33 persons, or any specific individuals within that group, were ineligible to vote because they were 'students employed during the school vacation period' on the date of the vote.

6. The respondent has satisfied the Board that of the 33 individuals in question, the following two persons were ineligible to vote because they were not regularly employed for not more than twenty-four hours per week as of the date of the vote (see *Trenton Memorial Hospital*, [1980] OLRB Rep. May 805): J. Conley and A. Rabeau.

7. For the foregoing reasons, the Board directs that all of the ballots cast in the July 6, 1982 pre-hearing representation vote be counted, with the exception of the eight ballots cast by persons whose names do not appear on the voters' list and the ballots cast by J. Conley and A. Rabeau."

4. Pursuant to that direction, the remaining 41 ballots cast in the pre-hearing representation vote were counted on September 21, 1982. Of those ballots, 34 were marked in favour of the applicant and 7 were marked against the applicant. After receiving the Form 73 Notice of Report of Returning Officer on Counting of Ballots, the respondent forwarded to the Board a statement of desire to make representations relating to the conclusions the Board should reach in view of that Report and requested "that the matter be further considered at a public hearing". Upon receipt of that statement of desire which is dated September 27, 1982, the Registrar served a Notice of Hearing upon each of the parties in accordance with section 70(4) of the Board's Rules of Procedure.

5. At this hearing, which was originally scheduled for November 1, 1982 and was subsequently adjourned to November 18, 1982 on the agreement of the parties, the Board called upon the respondent to show cause why we ought to reconsider our decision dated September 9, 1982 in this matter, as it appeared from the statement of desire that the respondent was, in effect, seeking to relitigate the issues dealt with, either expressly or implicitly, in that decision, namely, the "representativeness" of the pre-hearing vote, and the eligibility to vote of the 41 persons who cast segregated ballots in that representation vote. In his submissions to the Board on November 18, 1982, counsel for the respondent confirmed that the respondent was "in effect ... seeking a rehearing".

6. Section 70 of the Board's Rules of Procedure provides, in part, as follows:

(2) Subject to subsection (3), where a pre-hearing representation vote is taken,

(a) a party; or

(b) any employee or representative of a group of employees,

who desires to make representations in connection with the application or as to any matter relating to the representation vote or the accuracy of the report of the returning officer or the conclusions the Board should reach in view of the report, shall file a statement of desire as prescribed in Form 71 or 72, as the case may be, on or before the last day for the posting of copies of the report and notices under subsection 69(3).

(3) Where a representation vote is taken in connection with a direction that the ballot box be sealed and the Board subsequently directs that the ballots be counted,

(a) a party; or

(b) any employee or representative of a group of employees,

who desires to make representations as to the accuracy of the report of the returning officer on the counting of the ballots or the

conclusions the Board should reach in view of the report, shall file a statement of desire as prescribed in Form 73, on or before last day for the posting of the copies of the report and notices under subsection 69(3).

(4) Upon receiving a statement of desire to make representations in the form and manner required by this section that contains a statement that a party or any employee or representative of a group of employees desires a hearing before the Board, the registrar shall serve a notice of hearing in Form 8 upon each of the parties to the proceedings and upon each person who has filed a statement."

We do not interpret section 70(3) of the Rules as giving a party a right to relitigate matters which have already been litigated at a hearing held to deal with matters raised in a statement of desire filed with the Board in accordance with section 70(2). Nevertheless, the Board has a broad discretion under section 106(1) of the *Labour Relations Act* to "at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling." However, that jurisdiction has always been very carefully and cautiously exercised. As stated by the Board in *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. Sept. 609, at paragraph 3:

"Section 95 [now section 106] of *The Labour Relations Act* . . . provides the Board with a unique jurisdiction to '... if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling.' However, this jurisdiction is very carefully and cautiously exercised by the Board in that free recourse to the Board after the initial disposition of a matter would substantially undermine those values of speed and economy associated with the administrative practice of this Board. In other words, except for exceptional circumstances, litigation between the parties ought not to be prolonged. This principle was approved of in *International Nickel Company and United Steelworkers of America*, 63 CLLC 16, 284. Therefore, unless it can be established that new evidence is proposed to be adduced and this evidence could not have been obtained by reasonable diligence before the original hearing in this matter, the Board ought not to entertain the request for reconsideration."

See also *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185; *H. Kerr Construction Limited*, [1980] OLRB Rep. Aug. 1204; *Rehau Plastiks of Canada Limited*, [1980] OLRB Rep. May 774; *Thames Steel Construction Limited*, [1979] OLRB Rep. May 440; and *York University*, [1976] OLRB Rep. Apr. 187. As noted in the *York University* case, the Board is conscious that delays encountered in protracted proceedings operate to the prejudice of employees seeking rights to collective bargaining; in our experience delays occasioned by untimely objections and inordinately lengthy proceedings have in a number of instances contributed to the defeat of employees' expectations and have thereby undermined the very design of the Act as expressed in the preamble, namely, that of furthering harmonious relations between employers and employees by

encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees. Moreover, as recently noted by the Board in *Auto Jobbers Warehouse Ltd.*, [1982] OLRB Rep. May 649, at paragraph 4:

“We do not believe that the Board’s reconsideration power was intended to be exercised for the purpose of permitting a party to repair the deficiencies of its case. Indeed, if such were the practice, proceedings before the Board would be interminable and decisions inconclusive.”

(See also *Lorain Products (Canada) Ltd.*, [1978] OLRB Rep. March 262, and *Scarborough General Hospital*, [1970] OLRB Rep. March 1471.) Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise, and not to permit relitigation of issues by a party which, having received an adverse decision, now feels that a stronger case could have been presented.

7. We are of the view that the evidence which counsel for the respondent proposes to adduce at this hearing could have been garnered by reasonable diligence before the September 7, 1982 hearing of this matter. Moreover, counsel does not seek to make any legal argument which he did not have every opportunity to make on behalf of the respondent at that hearing. While the respondent may be dissatisfied with the decision dated September 9, 1982 which we issued following that hearing, we are of the view that the decision in question is neither wrong in law nor contrary to earlier Board practice. In reaching that view, we have considered the various authorities to which we were referred by counsel for the respondent, including *Trenton Memorial Hospital*, [1980] OLRB Rep. May 805; *Noranda Mines Ltd.*, (1969), 7 D.L.R. (3d) 1 (S.C.C.); *Peter Austin Manufacturing Company, Division of Kelton Corporation Limited*, [1967] OLRB Rep. May 144; *Emil Frant*, 57 CLLC ¶18,057; *United Co-operatives of Ontario, Owen Sound Retail Branch*, [1970] OLRB Rep. Dec. 954; and *Success Display Limited*, [1971] OLRB Rep. Oct. 636.

8. Thus, although section 106 of the *Labour Relations Act* gives the Board the broadest possible discretion to reconsider its own decisions where it considers it just or appropriate to do, having regard to all of the circumstances the Board is of the view that this is not an appropriate case in which to vary or revoke its decision dated September 9, 1982 in this matter. Accordingly, we will dispose of this application on the basis of the results of the 41 ballots cast by persons whom we found in that decision to be eligible to vote.

9. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

10. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in the City of Ottawa regularly employed for not more than twenty-four hours per week, save and except students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

12. As noted above, on the taking of the pre-hearing representation vote directed by the Board more than fifty per cent of the ballots cast were cast in favour of the applicant.

13. A certificate will issue to the applicant.

14. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

0502-82-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Local 641, Applicant, v. **Ottawa Truck Centre**, a division of Kemptville Truck Centre Limited, Respondent

Sale of a Business – One truck dealer purchasing part of assets of another dealership closing down – No accounts receivable, customers lists or service contracts assumed – Opening at different address in locality – Some employees of closed business hired – Whether purchase of business or expansion of existing operation

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. W. Murray and B. L. Armstrong.

APPEARANCES: *B. Chercover and Bill Healey for the applicant; Walter T. Langley and Gerald Tallman for the respondent.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER J. W. MURRAY; November 16, 1982

1. This is an application for a declaration that there has been a transfer or sale of a business within the meaning of section 63 of the Act.

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3. The applicant held bargaining rights for employees of Matheson International Trucks Limited, (hereinafter "Matheson") an International Harvester truck dealership located on Industrial Avenue in Ottawa. A collective agreement between U.A.W. Local 641 and Matheson was effective from October 1, 1979 until December 30, 1982. The Matheson dealership encountered financial difficulties however. The evidence estab-

lishes that the franchise was financed by Dealcor, a corporation established by International Harvester for the purpose of financing franchises whose owners could not make their own financial arrangements. It appears that over time, as Matheson's financial position deteriorated, Dealcor took over control and management of Matheson International Trucks Ltd.

4. In 1981 it became common knowledge that the franchise was in trouble. Dealcor had sought to find a new franchise to take over the Matheson operation, and during 1981 it had some discussion to that end with Mr. Gerald Keith Tallman, owner of the respondent Kemptville Truck Centre Limited, an International Harvester truck dealership in Kemptville, some 30 miles South of Ottawa. Mr. Tallman is not a Dealcor dealer, but rather has his own financing for both his Kemptville location and a further branch in Brockville.

5. According to Mr. Tallman's evidence, which the Board accepts, his Kemptville dealership draws substantially on the Ottawa market for its sales, and he was to that extent in competition with Matheson. With rising gasoline costs he detected a decreasing willingness in Ottawa customers to buy trucks for him and have them serviced in Kemptville, and as a result he began to consider the possibility of an Ottawa location. While there are no exclusive territorial rights attaching to International Harvester dealership, it is plain that as a matter of sound business practice the parent company would not approve of two dealerships in close proximity. With Matheson in the east end of Ottawa and a further dealership in Hull, it appears that Mr. Tallman could have expanded his operations by opening a dealership in the west end of Ottawa.

6. He had been giving some thought to that possibility when Dealcor approached him in 1981 with an invitation to take over the Matheson franchise in Ottawa. Mr. Tallman considered that opportunity and rejected it. In his opinion the Matheson franchise was over extended and could not be operated as a profitable business. Of particular concern was the high overhead involved, including what Mr. Tallman considered to be an unacceptably high rent. As a result nothing came of those negotiations.

7. The evidence of Mr. William Revell, a manager with Dealcor who was also an officer responsible for Matheson, is that the franchise lost \$340,000 in the fiscal year ending in October of 1981. It was decided to attempt to find a new dealer, and Matheson published a number of newspaper advertisements to that end. For a time a Mr. Brown was brought in as a manager with a view to his taking over the dealership. When it became apparent, however, that Mr. Brown could not obtain the necessary capital to finance his part of a Dealcor arrangement, that plan was abandoned.

8. That led to a final decision. On March 29, 1982 it was resolved by the directors of Matheson to close the business and liquidate its assets. The minutes of that meeting include the following resolution:

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FURTHER RESOLVED that the accountant is directed to effect the disposition of the entire assets of the corporation and in so doing, adhere to this liquidation plan:

1. *Inventory of Business Assets:*

A complete inventory of all assets of the business shall be taken and lists, by category of asset, are to be prepared and maintained in the records of the Corporation. In preparing such lists, each asset shall be adequately identified, its book value indicated, and when disposed of, the sales or credit invoice number, date and the amount received indicated and the purchaser identified.

2. *Disposition of Assets:*

In disposing of assets, the greatest possible return to the Corporation shall be sought to be realized, always consistent, however, with the Board's desire that the business be liquidated within a reasonable time in order to minimize further loss. The Board's target date for completion of the liquidation is May 31, 1982. In disposing of assets, the following guides shall be followed:

- a. Assets, returnable to a supplier, under contract, at a fixed price, shall be resold to the supplier unless a sale at a higher price is immediately available.
- b. Assets, returnable to a supplier, under contract, but at a discounted price to be negotiated with the supplier may be sold to the supplier if in the directors' judgment such discounted price is the best possible price then obtainable.
- c. Other merchandise, such as used equipment, oil, grease, etc., non-returnable parts, and also office equipment, shop equipment and tools, and related items may be sold either privately, at auction or by written bid as the circumstances suggest as being productive and of most return to the Corporation. No merchandise, such as herein described, shall be sold to International Harvester Canada Limited, except as a result of auction or after the taking of not less than two other bids.
- d. The Board will notify the lessor immediately of the firm's intent to vacate the facilities it now occupies on or before May 31, 1982.
- e. In liquidating accounts and notes receivable, every effort shall be put forth to effect payment in full. Where compromise of the obligation is warranted by circumstances, such compromise may be accepted at the discretion of the directors. The Board shall be consulted prior to writing of any obligation of more than \$50.

9. The evidence of Mr. Tallman, which the Board accepts, is that word of Matheson's demise caused him to take action on his general interest in expanding his Kemptville operations to Ottawa. Together with one of his management staff Mr.

Tallman went to Ottawa and looked over the stock and equipment of Matheson's which was being liquidated. They determined that they could use a part of the Matheson shop and office equipment. After negotiations with the Dealcor offices responsible for the liquidation Mr. Tallman purchased all of the shop and office equipment of Matheson for a purchase price of \$28,000. This included shop tools, shelving, a service truck, a fork lift and office furnishings, including a safe and some desks. While Mr. Tallman did not need all of the assets he was able to get a more favourable price by buying the entire lot than he could have by buying pieces individually at auction. He subsequently liquidated those parts of the equipment that he did not need at auction for approximately \$12,000.

10. The evidence establishes that Mr. Tallman did not acquire a large part of Matheson's assets. He did not, for example, purchase used vehicles valued at \$100,000 or Matheson's stock of truck parts worth some \$200,000. Those assets were apparently disposed of pursuant to Matheson's liquidation plan. It also appears that some new light trucks in Matheson's possession were in fact owned by International Harvester. These were not purchased by Mr. Tallman, although he did store them at the new dealership location which he opened in Ottawa, with the advantage that he was not required to pay interest on them while they were for sale of his lot. At the time of the hearing four of the new trucks had been sold and four remained on Mr. Tallman's lot.

11. In setting up his Ottawa operation Mr. Tallman did not acquire any other assets of Matheson's. He did not assume any accounts receivable, customer lists or service contracts which Matheson may have had. Nor, for the reasons given above, did he assume any lease from Matheson. When he decided to open an Ottawa branch in the wake of Matheson's closing, Mr. Tallman chose an entirely different landlord and location at 2716 Sheffield Road. Nor did he attempt to acquire any good will that might have attached to the Matheson name. When his Sheffield Road operation opened it was under the rubric "Ottawa Truck Centre, a Division of Kemptville Truck Centre Limited".

12. The Board also heard evidence of the hiring of employees previously working for Matheson's into the service of the Ottawa Truck Centre. It appears that at the peak of its operations Matheson had a substantial work force, including some thirty service mechanics. At the time of its closing its work force numbered approximately twenty-four, including management personnel. Of that number seven were hired to work for Mr. Tallman. One, who worked running a computerized parts data machine for Matheson was hired as a secretary-receptionist. Another, who had been parts manager for Matheson was hired as a parts clerk. A third, who had been a parts clerk was re-employed in the same capacity, as was a counter clerk. Two of Matheson's mechanics were hired as mechanics by Ottawa Truck Centre. Lastly, a salesman with Matheson, Mr. Henry Ritchie, was hired as general manager of the Ottawa Truck Centre.

13. The former Matheson employees constitute a minority of the work force of the Ottawa Truck Centre. Six other mechanics were hired, as well as 5 additional parts personnel, including a parts manager transferred from Kemptville. One salesman was hired and another was transferred from Kemptville, while the service manager was brought in from Kemptville as well. The work force totalled some sixteen at the date of the hearing, comprising an operation on an obviously smaller scale than Matheson's.

14. Counsel for the union submits that what has transpired is the "transfer" of an International Harvester dealership, or part of it, within the meaning of section 63 of the Act. That section provides, in part, as follows:

63.-(1) In this section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

15. Counsel for the union submits that the facts of the instant case disclose the sale of a business within the broad meaning of section 63. He maintains that while the elements of the Matheson dealership was dissolved, it was effectively revived by the reconstitution of a number of its elements through Mr. Tallman under the continuing umbrella of International Harvester. He argues that the facts of this case fall within the principles of the Board's decisions in *The Tatham Company Limited*, [1980] OLRB Rep. Mar. 366 and *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193.

16. In *The Tatham Company Limited* case for thirty years two brothers owned and managed a small construction company. As the last of the two brothers involved with the company reached retirement age a core group of managers who operated the company on a day-to-day basis formed their own management company and eventually took over the premises, assets and employees of Tatham, and carried on the same business at the same location. The Board concluded that what occurred was the transfer of Tatham's business within the meaning of section 63 of the *Labour Relations Act*. In reaching that conclusion the Board adopted the following passage from *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691:

In each case the decisive question is whether or not there is a continuation of the business . . . the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business

may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before. . . .

17. The distinction between a mere sale of assets and the sale of a business is not easy to define. As the Board observed in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1194:

This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a 'business' or 'part of a business' and the transfer of 'incidental' assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issues will be decided.

18. In our view the facts of his case are to be distinguished from those in *Tatham*. In the instant case an ongoing business, indeed a competitor of Matheson, took over a relatively small portion of Matheson's assets upon its liquidation, having specifically declined an earlier opportunity to take over the business as a going concern. While a small number of sales, service and management staff previously employed by Matheson were hired by Mr. Tallman, what they joined was not a continuation of Matheson's business, but an expansion into Ottawa of Mr. Tallman's existing business at Kemptville.

19. We agree with counsel for the union that care must be taken not to confuse form and substance. We cannot conclude, however, that a sale of Matheson's business has occurred from the bare fact that one International Harvester dealership has closed and another has opened elsewhere in the City of Ottawa using some of the same garage equipment, office furniture and a few of the same employees. There has been no transfer of parts or inventory, no transfer of logos, good will or physical premises or any of the trappings of Matheson's business that would insure a continuity of customers. It appears clear to the Board on these facts that a separate and a parallel business has been established in Ottawa, and that nothing remains of Matheson's business or any significant part of it.

20. While the transfer of management personnel must be closely examined, (see *Thunder Bay Ambulance Services Inc.*, [1978] OLRB Rep. May 467) and in the automobile and truck sales industry the transfer of a sales representative may be of considerable significance for business continuity, we cannot conclude that the hiring of Mr. Ritchie as general manager of Ottawa Truck Centre is enough, when viewed in light of the entire transaction, to turn what has happened into a transfer of Matheson's business. The essential character of what has transpired is the extension into Ottawa of Kemptville Truck Centre Limited, a parallel, separately financed, rival business operated by Mr. Tallman.

21. For the foregoing reasons the application must be dismissed.

DECISION OF BOARD MEMBER B. L. ARMSTRONG;

1. I must dissent from the majority opinion for the following reasons. In this case close attention must be paid to the nature of the business in question, namely a franchised truck dealership. Although the parent company, International Harvester, did not impose exclusive territorial rights on its franchises, it was the corporation's practice to grant only one dealership in the eastern region of Ottawa, in fact this was the only outlet in the entire city.

2. It was this dealership, initially run by Mr. Matheson, which the financial subsidiary of International Harvester, Dealcor, approached Tallman about taking over in 1981. This was the same dealership that was advertised in the newspaper in late 1981 when it was decided the outlet was in financial trouble. Again, this was the same dealership, it is being argued, which Tallman applied for and received when he heard it was available in May 1982.

3. There is further evidence which also leads to finding that this dealership constituted a business which was in part transferred to another location as per section 63(1)(a) and (b). First, Tallman hired seven of the employees from the Matheson outlet, a number which constitutes 44% of Tallman's work force of 16, at the time of the hearing. These recruits included a key salesman, Mr. Ritchie, who was responsible for the winding down of the Matheson operation. Mr. Ritchie is now general manager at the Tallman location.

4. Secondly, eight trucks on consignment from International Harvester at the Matheson franchise were transferred to Tallman's dealership. Indeed the selling of trucks on consignment from the parent company formed the heart of the ongoing business of this regional dealership. Four of these eight trucks had been sold at the Tallman location at the time of the hearing.

5. In light of Tallman's having obtained the sole franchise granted for the Eastern Truck Centre in Ottawa, and the transfer of both employees and inventory from one dealership location to another, a mere four miles away, I find the Tallman operation to constitute a transfer of part of a business as outlined in section 63 of the Act. Accordingly, I further find Mr. Tallman a party to the collective agreement in question.

0844-82-R Canadian Union of Operating Engineers & General Workers, Applicant, v. **The Queen Elizabeth Hospital**, Respondent, v. The Canadian Union of Public Employees, Intervener

Bargaining Unit – Certification – Pre-Hearing application seeking craft unit of stationary engineers – No licenced stationary engineers required after rebuilding of boiler room – No employees exercising craft skills – Board denying craft unit

BEFORE: M. G. Picher, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *Claude Duchesneau for the applicant; D. W. Brady and Joe Leforte for the respondent; Helen O'Regan and R. Gardener for the intervener.*

DECISION OF THE BOARD; November 10, 1982

1. This is an application for certification. The applicant seeks bargaining rights for a craft unit of operating engineers and their helpers at the respondent's hospital in Toronto. A pre-hearing vote was conducted on September 2, 1982, with the ballot box being sealed pending the resolution of objections to this application made by the respondent and by the intervener.
2. Both the respondent and the intervener maintain that there are no operating engineers employed by the respondent in either of its two locations, being at 130 Dunn Avenue, or in its hospital on University Avenue in Toronto.
3. Prior to 1979 the Dunn Avenue location had boiler room equipment that required licensed stationary engineers. Bargaining rights for the employees in the boiler room at that time were held on a craft basis by the International Union of Operating Engineers, local 796. The building was then demolished and rebuilt with boiler room equipment that did not require the constant care of licensed operating engineers as employees. Three of five stationary engineers then relinquished their employment. From that time the Canadian Union of Public Employees (CUPE), which holds bargaining rights for service employees, represented the two remaining employees performing maintenance work in the boiler room and any incidental maintenance work elsewhere in the hospital which had been previously performed by the licensed stationary engineers. It appears that CUPE also represented employees performing maintenance at the University Avenue location. The University Avenue hospital has never had boiler room equipment of its own, and has always brought in steam from an outside supplier, although the applicant appears to have obtained a certificate for a craft unit of stationary engineers at that location as well.
4. According to the Certificate of Registration issued for the Dunn Avenue building, the plant requires only a chief operating engineer with the "Stationary Fourth Class" qualification. Given the thermal hour rating of the heating plant there is no requirement for either a shift engineer, chief operator or shift operator. It is common ground that the Chief Engineer at Dunn Avenue is a member of management, being, in fact, the supervisor of all maintenance employees.

5. The first issue is whether there are any employees within the craft designation sought to be represented by the applicant. The representative of the applicant stresses that the chief engineer can not always be on duty. Employees classified as "Building Systems Mechanics" represented by the intervener and who may have stationary engineer's qualifications may then be responsible for the same equipment. He maintains that such employees should be viewed as stationary engineers for the purposes of certification. In our view that is not a compelling argument.

6. It has been the consistent practice of the Board not to establish units of maintenance employees apart from the traditional craft unit of stationary engineers. (*St. Mary's General Hospital (Kitchener)*, [1963] OLRB Rep. Feb. 496). The Board's general practice was summarized in *York Central Hospital*, [1978] OLRB Rep. 382 at 383:

Section 6(1) of *The Labour Relations Act* requires that the Board in certification applications determine "the unit of employees that is appropriate for collective bargaining". In carrying out this mandate the Board recognizes that the wishes of employees is a factor to be considered. However, the wishes of any particular group of employees must at times compete with other matters of industrial relations policy. With respect to public hospitals, these matters include a concern that employees not become unduly fragmented into too many bargaining units and also that any bargaining units which are established be capable both of withstanding the passage of time and also of forming a basis upon which solid collective bargaining relationships can be built. (These concerns are discussed at length in the *Stratford General Hospital* case, [1976] OLRB Rep. Sept. 459, where for the first time the Board was required to determine a policy with respect to bargaining units of "paramedical" employees.)

To date the Board has found separate hospital units of nurses, office staff, paramedical personnel and service employees (generally described in terms of "all employees" save and except certain exclusions) to be appropriate for collective bargaining purposes. As a general practice the Board will include both stationary engineers and maintenance staff in the service or "all employee" unit. (See: *Brockville General Hospital*, (1957) 57 CLLC ¶18, 061.) The major departure from this practice occurs when a craft union of stationary engineers, such as the applicant, applies to be certified only for a group of stationary engineers who are not already included in any other unit. In such a situation the Board will deem a craft unit of stationary engineers to be appropriate. This, however, is not done pursuant to the Board's general power under the Act to determine appropriate bargaining units but rather follows from the special status accorded to craft unions under section 6(2) of the Act. But while the Board will in the appropriate circumstances define craft units of stationary engineers, in the hospital field it will not generally define bargaining units either in terms of maintenance

employees alone or maintenance employees together with stationary engineers.

7. In *Joseph Brant Memorial Hospital*, [1981] OLRB Rep. Nov. 1598 a change of boiler room equipment resulted in the cessation of employment of stationary engineers and a transfer of the non-licensed maintenance functions which they had also occasionally performed to the bargaining unit of service employees represented by CUPE Local 1065. The International Union of Operating Engineers, Local 772, which had represented the stationary engineers in a craft unit, claimed the collateral maintenance work as part of its jurisdiction both through continued demands on the hospital to bargain and arbitrate under the *Hospital Labour Disputes Arbitration Act* and by resisting an application for the termination of its bargaining rights. Upon the filing of a jurisdictional dispute application by the Hospital the Board found that there were no employees in the unit previously represented by the operating engineers. To find otherwise would have been tantamount to certifying that union for a unit consisting of maintenance employees alone, contrary to the Board's general practice and to an earlier decision involving the same employer and union in which that very unit was found to be inappropriate. The Board therefore concluded that unlicensed general maintenance work formerly shared between CUPE and the I.U.O.E. should thereafter be assigned exclusively to members of CUPE, as well as all unlicensed boiler room maintenance. The Board's decision, consistent with its established policy in respect of craft units, expressly restricted the I.U.O.E.'s bargaining rights to "work requiring a licensed stationary engineer".

8. In an application of this kind where the registration certificate for a stationary power plant discloses that no licensed stationary engineers are required the applicant craft union must satisfy the Board either that licensed employees are in fact needed under the *Operating Engineers Act*, R.S.O. 1980, c. 363 or that the employees "exercise technical skills" within the meaning of section 6(3) of the Act. In this regard the applicant relies on a letter from the Director of the Pressure Vessels Safety Branch of the Technical Standards Division of the Ministry of Consumers and Commercial Relations. Placed at its highest, and discounting its hearsay deficiencies, the letter would do no more than suggest that in hospitals and institutions for boiler equipment like the respondent's at Dunn Avenue the Branch "requests" that a licensed operator be on duty one eight hour shift per day seven days a week. An examination of the *Operating Engineers Act* and the pertinent regulation made under it (O. Reg. 740. s. 24, 2(a)(ii)) does not disclose any absolute staffing requirement for the respondent's plant (a fourth class stationary power plant) beyond one fourth class stationary engineer employed in the capacity of chief operating engineer in charge of the plant. The preference of the Branch for further staffing would appear to be, at best, a suggestion. It does not displace the conclusion that the respondent's power plant does not require licensed stationary engineers in the ranks of its employees. Moreover the material before the Board does not establish that the work performed by the building systems mechanics substantially involves the exercise of technical skills previously performed exclusively by operating engineers.

9. On these facts, and in light of the principles canvassed above, the Board is satisfied that a craft bargaining unit should not be established in the instant case.

Alternatively, for the policy reasons also canvassed above, we see no reason to establish a fragmented non-craft unit of maintenance employees. Such a unit would unduly fractionalize the respondent's bargaining structures and would inevitably conflict with the bargaining rights and jurisdiction of CUPE, the intervener, which presently represents service employees at both of the hospital's locations.

10. For the foregoing reasons the application is dismissed.
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0677-82-R Labourers' International Union of North America – Local 1036, Applicant, v. **Reliable Window Cleaners (Sudbury) Limited**, Respondent

Certification – Constitutional Law – Nuclear refinery contracting out cleaning services to respondent cleaning company – Whether respondent's employees engaged in cleaning services at refinery within provincial or federal jurisdiction – Cleaning services not essential or integral to "federal" work – Employees subject to provincial legislation

BEFORE: Ian Springate, Vice-Chairman, and Board Members R. J. Swenor and B. K. Lee.

APPEARANCES: *David Strang, Celina Buswa, Rene Buswa and Mike Renoulds for the applicant; Leslie H. MacLeod and N. Bertuzzi for the respondent.*

DECISION OF THE BOARD: November 17, 1982

1. This is an application for certification filed pursuant to the provisions of the *Labour Relations Act*. The respondent, Reliable Window Cleaners (Sudbury) Limited ("Reliable") contends that this Board lacks jurisdiction to entertain the application in that legislative jurisdiction over labour relations at the relevant job site lies with the Parliament of Canada rather than the Legislature of the Province of Ontario.

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3. Reliable is based in the City of Sudbury. The firm provides cleaning services to a number of clients, one of which is Eldorado Nuclear Limited ("Eldorado"). Eldorado operates a nuclear refinery at Blind River. Reliable has a contract to provide Eldorado with cleaning services in its administration and services buildings which are located at the site of the refinery. Reliable has no other clients in Blind River, and accordingly, any employee who works for the company in Blind River works only at the Eldorado site.

4. Section 92(10) of the *British North America Act* provides that provincial legislative jurisdiction does not extend to works declared by the Parliament of Canada to be for the general advantage of Canada. Section 17 of the *Atomic Energy Control Act*, an Act of the Parliament of Canada, provides as follows:

"17. All works and undertakings whether heretofore constructed or hereafter to be constructed,

(a) for the production, use and application of atomic energy,

(b) for research or investigation with respect to atomic energy, and

(c) for the production, refinery or treatment of prescribed substances, are and each of them is declared to be works or a work for the general advantage of Canada."

Section 2 of the same Act lists a number of "prescribed substances". It is not disputed that at Blind River Eldorado is engaged in refining at least one of these prescribed substances. It follows that the Canadian Parliament has legislative jurisdiction over Eldorado's operations at Blind River.

5. It is now settled law that as a general proposition the provinces have exclusive jurisdiction over labour relations matters. See: *Toronto Electric Commissioners v. Snider* [1925] A.C. 396. However, by way of exception, the Federal Parliament has jurisdiction over labour relations if such jurisdiction is an integral part of its primary competence over some other federal subject. See: *In re the validity of the Industrial Relations and Disputes Investigation Act (the Stevedoring Reference)* [1955] S.C.R. 529. Accordingly, there can be no doubt that notwithstanding that labour relations is generally a provincial matter, the Federal Parliament has jurisdiction over the labour relations of employees engaged in the refining of prescribed substances at the Eldorado site. The issue before us, however, is whether the employees of Reliable at Blind River also come within federal jurisdiction.

6. The Courts have on a number of occasions dealt with the issue of how the line is to be drawn between federal and provincial jurisdiction. Much of the jurisprudence in this area was summarized as follows by the Federal Court of Appeal in *Canada Air Line Employees' v. Wardair Canada (1975) Ltd. et al* [1979] 2 F.C. 91 pp. 95-97:

"Where there is a work, undertaking or business in relation to which Parliament has legislative authority in the field of labour relations, a problem arises as to where the line is to be drawn between areas in respect of which Parliament can so legislate and other areas in respect of which labour legislation falls in the provincial domain. Certain of the cases where this type of problem arises, may be classified as follows:

(a) where an essential component of operating a federal work, undertaking or business is carried on by a person other than the principal operator thereof under some business arrangement for co-ordinating their activities,

(b) where an essential component of operating a federal work or undertaking is carried on at a location physically remote from the work or undertaking,

(c) where fringe operations, reasonably incidental to a federal work, undertaking or business are carried on by the operator thereof as an integral part of the operation thereof, even though they are not essential to its operation,

(d) where a person other than the operator of a federal work, undertaking or business carries on activities that are not essential to the operation thereof but could be carried on by the operator thereof as reasonably incidental to the operation of that work, undertaking or business.

These different classes of problem call for further comment.

With reference to Class (a), when the essentials of operating a work, undertaking or business within the federal field are carried on in part by one operator and in part by another, the employees of both fall within the federal legislation field. This can be deduced from the *Stevedoring Reference* to the Supreme Court of Canada.

The problem in Class (b) is like the problem in Class (a). Where part of the essentials of operating a federal work or undertaking are carried on at a place physically remote from the work or undertaking, the employees at such a remote place nevertheless fall within the federal field. This is involved in what was decided by this Court last December in the *C.S.P. Foods* case *supra* page 23. (see *C.S.P. Foods Ltd. v. C.L.R.B.* [1979] 2 F.C. 23).

A more difficult problem arises in connection with Classes (c) and (d). A particular activity may be reasonably incidental to the operation of a federal work, undertaking or business without being an essential component of such operation. For example, an interprovincial railway may have its own laundry facilities or its own arrangement for preparing food for passengers, or, alternatively, it may send its dirty linen to an outside laundry or buy prepared food. Generally speaking, where such an activity is carried on by the operator of the federal work, undertaking or business as an integral part thereof, it is indeed a part of the operation of the federal work, undertaking or business. Where, however, the operator of the federal work, undertaking or business carries on the operation thereof by paying ordinary local businessmen for performing such services or for supplying such commodities, the business of the person performing the service or preparing the commodities does not thereby automatically become transformed into a business subject to federal regulation. Compare the decision of the Supreme Court of Canada in the *Construction Montcalm* case (1979) 25 N.R. 1, that was delivered last December.

To sum up with reference to Classes (c) and (d), as I understand the law, where something is done as an integral part of the operation of

a federal work, undertaking or business and that something is *reasonably incidental* to such operation, it may be regulated by Parliament as part of the regulation of that work, undertaking or business even though it is not *essential* to the operation of such a work, undertaking or business; but where such a thing is made the subject of a separate local business or businesses, it cannot be regulated by Parliament merely because, if it were done as an integral part of operating a federal work, undertaking or business, it could, as such, be regulated by Parliament.”

7. It is apparent from the above summary that had Eldorado employed its own cleaning staff for its administration and services buildings, labour relations matters affecting the employees involved would have fallen under federal jurisdiction. However, in that Eldorado has contracted out the work to Reliable, the question becomes whether or not the cleaning services involved are an essential component of operating a federal work, such that they are within class (a) as set out in the *Wardair* case, and accordingly, come within federal jurisdiction. If the cleaning services are not an essential component of the operation, then they would come within class (d), and labour relations matters affecting the employees involved would come within provincial jurisdiction.

8. The employees of Reliable have no direct involvement with the operation of the refinery or the handling of any prescribed substance. Their function is limited to providing cleaning services in Eldorado's administration and services buildings. In our view, while these services are reasonably incidental to the Eldorado's refinery operation, they are not an essential or integral part of it. Instead, they are analogous to the examples referred to in the *Wardair* case of laundry and food services being supplied by an outside firm. This being the case, we view the services being provided by Reliable as coming within the class (d) situation and conclude that since they are being provided by a local firm, labour relations over the employees involved does not come within federal jurisdiction. It follows that the employees of Reliable are subject to the provisions of the *Labour Relations Act*. In this regard, see also: *Construction Montcalm Inc. v. The Minimum Wage Commission* [1979], S.C.R. 754 and *St. Hubert Base Teachers' Association v. Attorney - General of Canada* (1981) 130 D.L.R. (3d) 35.

9. Having regard to the above, the Board concludes that it does have jurisdiction to entertain the instant application.

10. The application is to be re-listed for hearing for the purpose of entertaining the evidence and the representations of the parties with respect to all outstanding matters, including the issue of who is to be considered as an employee in the bargaining unit. The complaint under section 89 of the Act in File No. 0850-82-U is to be listed for hearing at the same time.

0983-82-R Angela Lopardo, Applicant, v. The International Ladies' Garment Workers' Union, Respondent, v. **Sigal Shirt Company Limited**, Intervener.

Bargaining Rights – Practice and Procedure – Termination – Voluntary Recognition – Employer voluntarily recognizing union as part of settlement of representation and unfair labour practice disputes – Employee admitting majority support but seeking representation vote – Union counter-claiming Board order confirmatory of its representative status – Board declining to direct vote – Refusing to make confirmatory order which gives union unusual form of “certification”

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members C.G. Bourne and H. Kobryn.

APPEARANCES: *Nicolas Canizares for the applicant; S. B. D. Wahl, H. Stewart and R. Sutherland for the respondent; Barry Edson for the intervener.*

DECISION OF THE BOARD; November 2, 1982

1. This is an application for a declaration that the respondent, at the time a recognition agreement was entered into, was not entitled to represent the employees in the bargaining unit. The Board by its decision dated October 8, 1982, dismissed this application and stated that reasons would follow. These are the reasons.

2. Originally the application was founded upon three grounds:

1. There was a denial of natural justice regarding the rights of employees as neither the Respondent nor the Employer advised the employees that a voluntary recognition agreement would be signed. Accordingly the employees were denied their right to make submissions to the Ontario Labour Relations Board prior to recognition.

2. On June 25, 1982 (amended) the date the voluntary recognition agreement was entered into the Respondent did not enjoy the majority support of the employees in the bargaining unit. Accordingly the voluntary recognition of the Respondent is invalid.

3. The Employer and the Respondent entered into the voluntary recognition agreement for their own separate purposes and neither party took into consideration the wishes and desires of the employees in the bargaining unit.

After hearing extensive opening statements and after a Labour Relations Officer met with the parties, the applicant withdrew grounds #1 and #3 because the applicant was satisfied there was no “sweetheart” deal and that the employees in the bargaining unit had received sufficient notice of proceedings so that intervention could have taken place. With regard to ground #2 the applicant was prepared to admit the *bona fides* of the respondent's membership cards and the intervener's list of employees on payroll as of June 25, 1982, the agreed date upon which the recognition agreement was entered

into. On the basis of this the applicant acknowledged that as of June 25, 1982 there was membership support in the form of membership cards in the respondent for 46 of the 87 employees in the appropriate bargaining unit. While acknowledging that this amount of support would in the normal course lead the Board to conclude that the respondent was entitled to represent the employees in the bargaining unit, the applicant requested the Board to make an unusual decision in this case. Relying on section 60(2) the applicant requested the Board to exercise its discretion to hold a representation vote.

3. Not surprisingly, both the respondent and the intervener argued strongly that no vote should be held. The respondent went further than merely requesting that the instant application be dismissed and sought an order of this Board confirming the agreement of the respondent and intervener entered into on June 25, 1982 and confirming the "representative status" of the respondent to represent employees.

4. The facts necessary to the Board's determination are that On June 30, 1982 the Board "endorsed for the record" in OLRB File Nos. 2328-81-U, 2382-81-R and 2631-81-U Minutes of Settlement between the respondent and the intervener. Among other matters settled the intervener recognized:

"... the International Ladies' Garment Workers' Union as the bargaining agent for all employees of the Sigal Shirt Company Limited in Metropolitan Toronto, save and except forepersons, persons above the rank of forepersons, office and sales staff, mechanics, designers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period. For purposes of clarity Laurenio Amaral and Achilles Recchia are forepersons;"

and acknowledged that as of June 25, 1982 the respondent represented the majority of the employees in the bargaining unit described above. The Minutes of Settlement also recorded the acknowledgement by both parties that the entering into of the settlement served as notice to bargain in accordance with the Act. The other matters dealt with amounted to the resolution, on a without prejudice basis, of issues raised in a number of unfair labour complaints pursuant to section 89 both before and after a certification application filed February 17, 1982.

5. Both the respondent and intervener do not want this settlement disturbed by the holding of a representation vote. The respondent claims that if a vote were ordered it would be required to resurrect settled section 8 and section 89 applications. This result would fly in the face of the desirable and fostered policy of the Board to encourage parties to settle their differences.

6. The Board is not prepared to upset in these circumstances a settlement of representation rights and other related matters between these parties. The applicant has not offered the Board any evidence upon which the Board could act to exercise its discretion and order a vote pursuant to section 60. Indeed in light of the applicant's admissions noted in paragraph 2 above, the Board is hard pressed to imagine what evidence the applicant could call to persuade us that a vote was necessary.

7. We have also declined to make the confirmatory orders requested by the respondent. An order confirming the agreement entered into by the respondent and intervener on June 25, 1982 would appear to be unnecessary in light of the previous Board decision endorsing for the record such agreement. As to the requested order regarding "representative status", the Board has determined that this could be regarded by some as a form of certification. At this point in time the respondent is a bargaining agent which has been voluntarily recognized by the intervener and, as such, is a different position than a bargaining agent which has been certified (see for example sections 5 and 61 of the Act). If the respondent had been applying for certification with the membership support noted above as of June 25, 1982, it would not be entitled to certification without a vote unless it could show circumstances justifying this under section 8 (see for example *K-Mart Canada Limited* [1981] OLRB Rep. Jan. 60 and cases cited therein). The respondent should not be permitted, through a response to a section 60 application, to gain certified status which could only have been achieved through the regular procedures of the Board, to improve its position beyond that of June 25, 1982.

8. For all these reasons the Board has dismissed the application.

0983-82-R Angela Lopardo, Applicant, v. The International Ladies' Garment Workers' Union, Respondent, v. **The Sigal Shirt Company Limited**, Intervener.

Reconsideration - Termination - Voluntary Recognition - Application seeking reconsideration of dismissal decision or direction of vote - Test in section 60 whether union had majority support at time recognition agreement entered into - Board not having power to direct vote where union had such majority support - Section 60 not providing for termination where support existed at time of recognition agreement

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members C. G. Bourne and H. Kobryn.

DECISION OF THE BOARD; November 30, 1982

1. This is an application for reconsideration by the applicant with respect to a decision of the Board dated October 8, 1982 (reasons released November 2, 1982) wherein the Board dismissed her application under section 60 for a declaration that at the time a recognition agreement between the respondent and the intervener was entered into, the respondent was not entitled to represent the employees in the bargaining unit. In the alternative, the applicant requests that the Board order a "final representation vote" for the purpose of determining whether or not the respondent has "sufficient support" to represent the bargaining unit.

2. In support of this application was filed an undated petition which purports to be signed by 46 employees of the Sigal Shirt Company. These signatures appear below the following text:

We the undersigned, employees of the Sigal Shirt Company and members of the proposed bargaining unit hereby execute this Petition in support of an application to the Ontario Labour Relations Board for a reconsideration of the Board's determination that the application by Angela Lopardo for Termination of Bargaining Rights be dismissed and in the alternative we submit this Petition in support for a reconsideration by the Board for a further representation vote to determine whether the International Ladies' Garment Workers' Union has sufficient support to represent the employees of the proposed bargaining unit.

3. The Board has reviewed the applicant's request for reconsideration and a representation vote, together with the supporting petition, and finds nothing contained therein which, even if presented prior to its decision of October 8th, would have led the Board to conclude that:

(i) as of June 25, 1982, the date the voluntary recognition agreement was entered into, the respondent did not enjoy the majority support of the employees in the bargaining unit; or

(ii) the Board should order a representation vote.

4. Section 60 is a means by which employees can contest the representation rights assumed by a union and recognized by an employer outside of the certification procedures laid down in the Act. The normal basis of certification under the Act is evidence of sufficient numerical support, either through a vote or membership cards, among employees in the bargaining unit. The acquisition of representation rights need not be accomplished through certification by the Board. It is still possible to have recognition agreements and/or collective agreements where no certification has taken place. The Legislature, anticipating that recognition agreements could be entered into where a trade union enjoys less support or support in a different form than would be necessary under the Act for certification and employees thereby could have their rights under section 3 of the Act denied, enacted section 60 to allow employees to dispute the entitlement of the trade union to represent them as of the date the recognition was entered into. Section 60 was not intended to be an opportunity to terminate properly acquired representation rights.

5. There is no merit or necessity in repeating here what was said in the Board's reasons dated November 2, 1982. The central issue in section 60 is whether, *at the time* of the entering into of the recognition agreement, the respondent was entitled to represent the employees in the bargaining unit. From the agreed facts before the Board it was clear that such entitlement existed on June 25, 1982. Indeed, it was conceded by the applicant at the previous hearing in this matter that the respondent's support as it existed on June 25, 1982 was not being challenged. Although the petition is undated, the text indicates that it was composed and circulated sometime after the Board's decision in this matter. It does nothing to unsettle the Board's conclusion regarding the strength of the respondent's support as of June 25, 1982.

6. With respect to the ordering of a vote, the Board has discretion under section 60(2) to hold a representation vote *before* disposing of an application under section

60(1). This section does not give the Board a general power to resort to a Board-supervised vote as an aid in resolving a question of employee wishes where the evidence shows that at the relevant time (June 25, 1982) the respondent was entitled (in this case majority support) to represent the employees in the bargaining unit. The signatories to the petition may well have wished to show they no longer support the respondent. However, this has no effect on a section 60 application in that the relevant time for determining the entitlement of the respondent to representation rights is the date when the recognition agreement was entered into. A representation vote can only be ordered where there is a lack of certainty as to the entitlement as of that date and a vote is necessary to resolve that uncertainty. In this case there is no uncertainty because the applicant, through her counsel, conceded that on June 25, 1982, the respondent had as members 46 of the 87 employees acknowledged to constitute the bargaining unit.

7. For all of these reasons the Board has decided to dismiss the request for reconsideration.

1310-82-R Ontario Public Service Employees Union, Applicant, v. Sudbury Memorial Hospital, Respondent.

Bargaining Unit – Practice and Procedure – Union seeking broad paramedical part-time unit – Relying on *Stratford General Hospital* – Pre-Stratford full-time units certified on narrower basis – Board policy of mirroring part-time with full-time units – Stratford principle not intended to disrupt longstanding certificates and bargaining patterns

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members W. G. Donnelly and B. L. Armstrong.

APPEARANCES: *Virgery Vanier, Pauline R. Seville and Ellen A. Rayner for the applicant; K. R. Valin and Lloyd Harris for the respondent.*

DECISION OF THE BOARD; November 15, 1982

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The applicant claims that the following bargaining unit is appropriate for collective bargaining:

All paramedical employees of the respondent at Sudbury, Ontario, regularly employed for not more than 24 hours per week and students employed in the school vacation period, save and except persons covered by subsisting collective agreements.

The respondent on the other hand claims the following to be a bargaining unit appropriate for collective bargaining:

All medical laboratory technologists, medical laboratory assistants, radiology technologists and radiology assistants in Pathology and Radiology Departments respectively of Sudbury Memorial Hospital regularly employed for not more than twenty-four (24) hours per week, save and except clinical instructor, persons above this rank, office and clerical workers, students, students employed during their school vacation period, and persons covered by other subsisting collective agreements.

4. To understand fully the difference between the parties, the history of various relevant bargaining relationships involving the respondent must be examined. On November 17, 1972, the predecessor of the applicant, The Civil Service Association of Ontario, Inc., was certified as bargaining agent for:

All medical laboratory technologists and medical laboratory assistants of Sudbury Memorial Hospital employed by Sudbury Memorial Hospital in Sudbury, save and except assistant Technical Director of Laboratory, persons above this rank, office and clerical workers, students, persons regularly employed for not more than twenty-four hours per week, students employed during their school vacation periods and persons covered by a subsisting collective agreement between Sudbury Memorial Hospital and Canadian Union of Public Employees Local 1182.

On January 2, 1975, the same predecessor was certified as bargaining agent for:

All Radiology Technicians and Radiology Assistants in the Radiology Department of Sudbury Memorial Hospital in Sudbury, save and except the Assistant Chief Technician, office and clerical workers, students, persons regularly employed for not more than twenty-four hours per week, students employed during school vacation period, and persons covered by subsisting certificates issued by the Ontario Labour Relations Board.

Finally on January 7, 1976, the same union was certified as bargaining agent for:

All office, clerical, technical employees of Sudbury Memorial Hospital at Sudbury, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, supervisors and foremen, persons above the rank of supervisor and foreman, secretary to the administrator, secretary to assistant administrator, secretary to the director of nursing, secretary to assistant director of nursing, payroll officer, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week and persons covered by subsisting collective agreements.

Subsequent to these certifications, collective agreements were negotiated. The respondent filed with the Board two documents described on their face to be subsisting collective agreements. One is between the respondent and O.P.S.E.U. Local 659 (hereinafter described as "the 659 agreement") and the other between the respondent and O.P.S.E.U. Local 619 (hereinafter described as "the 619 agreement"). The 659 agreement described the scope of the agreement to be:

ARTICLE 1 – SCOPE

1.01 The Employer recognizes the Union as the sole and exclusive collective bargaining agent of all medical laboratory technologists and medical laboratory assistants of Sudbury Memorial Hospital employed by Sudbury Memorial Hospital in Sudbury, save and except assistant technical director of laboratory, persons above this rank, office and clerical workers, students, persons regularly employed for not more than twenty-four (24) hours per week, students employed during their school vacation period and persons covered by other subsisting collective agreements.

1.02 The Employer further recognizes the Union as the sole and exclusive collective bargaining agent of all radiology technologists and radiology assistants in the Radiology Department of Sudbury Memorial Hospital in Sudbury, save and except the assistant chief technologist, office and clerical workers, students, persons regularly employed for not more than twenty-four (24) hours per week, students employed during school vacation period and persons covered by other subsisting collective agreements.

The 619 agreement described the scope of the agreement to be:

ARTICLE 1 – SCOPE

1.01 The Employer recognizes the Union as the sole and exclusive bargaining agent of all office, clerical and technical employees of Sudbury Memorial Hospital at Sudbury, Ontario save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, supervisors and foremen, persons above the rank of supervisor and foreman, secretary to the Administrator, secretary to the Assistant Administrator, secretary to the Director of Nursing, secretary to the Assistant Director of Nursing, payroll officer, accountant, secretary to the Director of Financial Services, students employed during the school vacation period, persons regularly employed for not more than twenty-four (24) hours per week and persons covered by subsisting collective agreements.

5. The important difference between the description of the bargaining unit or units as set out in the scope clause of the 659 agreement and the unit proposed by the respondent in this application is the exclusion of a "clinical instructor". The respondent

says that the person in that classification does not share a community of interest with the other employees. The applicant advised the Board that the exclusion of this classification was disputed. The issue of whether a clinical instructor should or should not be excluded was set aside while the Board determined the major difference between the parties regarding the bargaining unit description.

6. The applicant maintains that its unit is appropriate because it is in line with the Board's decision in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459 wherein the Board decided, in concurrent applications for certification by two different unions, that the broader "all paramedical" employees unit was appropriate and rejected the distinction between professional and para-professional as being the boundary line for bargaining units in the hospital sector. The applicant also justifies its description on the basis that if the respondent's description is accepted, there are persons employed on a part-time basis who would ordinarily fall in the paramedical category who would be denied their bargaining unit rights. The applicant questions whether the Board in future would necessarily certify only a part-time office, clerical and technical unit to mirror the full-time unit described in the 619 agreement. The applicant poses the hypothesis of the part-time office and clerical employees only being organized by another union and the so-called "technical" employees being left out. If in that situation the respondent employer agrees to the smaller unit, the Board would have no information necessary to override the agreement of the parties and require that the part-time unit include the part-time "technical" employees. This, in the applicant's contention, would result in further fragmentation of an already too fragmented situation. The respondent argues that the history of how the bargaining relationship have evolved and the way in which negotiations have taken place justify the respondent's bargaining unit. All the certifications took place prior to the *Stratford General Hospital* decision, *supra*. The bargaining regarding the employees covered by the 659 agreement has been most recently on a provincial basis, and prior to that, as a part of a group of Sudbury area hospitals which had similar units. In contrast the bargaining for the 619 unit has been strictly between the respondent and the applicant. The respondent maintains that the part-time units should "dovetail" into each full-time unit already certified and that although the certified units are not perfect (assuming *Stratford General Hospital's* unit is perfect) there is a workable bargaining pattern already in place which this Board should not disrupt. If the Board agreed with the applicant, the collective agreement pertaining to part-time, so-called "technical" employees (e.g., physiotherapist and dietician) could be settled by provincial arbitration at a time when their full-time counterparts, in the unit described in the 619 agreement, have not settled their agreement through local negotiations. Finally the respondent contended that the *Stratford General* decision has never been used to reconstruct units already certified prior to the date of its decision. The applicant answers these points in the following way:

- (1) the office, clerical technical unit was the last full-time unit in the respondent and the policy of the Board required it to sweep the so-called "technical" employees in;
- (2) to maintain the so-called "technical" employees in the part-time unit with the office and clerical means that none of these paramedical people will be plugged into provincial bargaining;

- (3) in any event, provincial bargaining structure should not be used as a rationale for maintaining historical divisions because provincial bargaining is not a certainty in the future;
- (4) in other instances involving O.P.S.E.U. the Board has certified a paramedical unit in the face of previously existing units of narrower scope.

7. The Board has determined that the unit proposed by the respondent is more appropriate than that of the applicant. If *Stratford General Hospital*, supra, did not exist, there is no question that the Board would have found the respondent's unit the appropriate one reflective of both Board certificates and a long-standing bargaining history. The Board has, absent any unusual factors, generally followed a policy of having part-time units, organized at the same time or subsequent to full-time units, "mirror" the full-time unit. No cases were cited to the Board where the Board has done otherwise and the Board does not consider in the circumstances that this policy should be modified. This policy could potentially result in the part-time "technical" employees' collective bargaining future being dependent on future organization of the part-time counterpart to the unit described in the 619 agreement. The Board, in this instance, does not consider it likely that the so-called "technical" employees will necessarily be deprived of their bargaining rights because they will have an opportunity to intervene, if they wish, in the application for part-time office and clerical employees only, or, in the alternative, if by some means they could not have been aware of their exclusion, the Board would not refuse to certify them subsequently merely because neither the technical group nor the Board was aware of the exclusionary effect of certifying the agreed part-time office and clerical unit. In any event, if the applicant is correct in its submissions that the unit described in the 619 agreement was one the Board insisted upon because that was the last full-time unit in the respondent, presumably the same sort of insistence would occur in a subsequent application for the part-time counterpart.

8. The *Stratford General Hospital* decision has not caused the Board to depart from its usual approach because the purpose behind that decision was to set a pattern for *future* organization in the hospital sector in order that the most appropriate bargaining unit would be established in light of the expanding classifications of paramedical staff in hospitals. It was presumed that this would facilitate bargaining by creating the largest unit having a community of interest. However, where parties have successfully bargained and have an established structure, they have obviously learned to live with a less than optimum structure which is nevertheless workable and viable. To try at this point in these circumstances to create the world of bargaining as established in *Stratford General* would unnecessarily disturb a prior existing successful regime of collective bargaining.

9. As mentioned above, the parties are in dispute over whether the person occupying the position of clinical instructor should be included or excluded from the bargaining unit. In view of the disagreement, the Board appoints an officer to inquire into and report to the Board on the community of interest, if any, between the person classified by the respondent as clinical instructor and the other employees in the bargaining unit described in paragraph 11.

10. No matter what the Board's final determination might be concerning the possible exclusion of the clinical instructor from the bargaining unit, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on October 25, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. Having regard to the provisions of section 6(2) of the Act, the Board hereby certifies the applicant on an interim basis for all medical laboratory technologists, medical laboratory assistants, radiology technicians, radiology assistants of the respondent at Sudbury regularly employed for not more than 24 hours per week, and students employed during the school vacation period, save and except persons covered by subsisting collective agreements.

12. A formal certificate must await a final resolution of the composition of the bargaining unit.

0875-82-R Cornelius Zondag, Applicant, v. Labourers' International Union of North America, Local 1081, Respondent, v. **Thomas Construction (Galt) Limited**, Intervener

Practice and Procedure – Termination – Formal termination application clearly untimely – Board treating prior correspondence with Board as timely application – Whether applicant hired contrary to union security provisions of agreement – April Waterproofing decision not applied in particular circumstances

BEFORE: D. E. Franks, Vice-Chairman, and Board Members R. J. Swenor and B.K. Lee.

APPEARANCES: *Cornelius Zondag for the applicant; B. Fishbein, L. Schertberg and T. Connolly for the respondent; W. A. Meyer for the intervener.*

DECISION OF THE BOARD; November 22, 1982

1. This is an application for termination under section 57 and section 60 of the *Labour Relations Act*.

2. Counsel for the respondent trade union raised two preliminary objections to the present application. The first, that it is untimely and the second, concerning the status of the applicant to bring the present application.

3. The present application was filed on July 29, 1982. The collective agreement in force between the respondent and the intervener is the provincial collective agreement relating to labourers and the agreement covering the period after April 30, 1982 to April 30, 1984 was in effect from June 9, 1982 to April 30, 1984. It would appear, therefore, that the present application not having been made within the last two months before the expiring of the collective agreement is untimely.

4. The applicant, however, filed with the Board certain correspondence which he had with the Board prior to the making of the instant application. This correspondence begins with a letter dated April 28, 1982 addressed to the Labour Relations Board and reads as follows:

"As I was at your Branch on April 28/82 and did not get any satisfactory answers from your Solicitor Mr. D. Watson I would like to inform the Board that as an employee of Thomas Construction (Galt) Ltd. have *never* been approached *nor* have applied to the Labourers' International Union of North America to have myself and/or co-worker Andus Orosz represent us as bargaining agent.

We do not wish to have the Labour Union represent us.

If there has been an agreement drawn up or proposed we hereby with this writing make an application to the Ontario Labour Relations Board for *decertification* of such an agreement."

The letter is signed by the applicant and the other employee in the bargaining unit. This letter was responded to by a Board solicitor on May 13, 1982:

"Thank you for your recent letter addressed to the Ontario Labour Relations Board, which has been directed to my attention for reply. You requested the decertification of the Labourers' Union as bargaining agent for employees of Thomas Construction. You stated that you are employed by that Company and that you had never been approached by the Union and that you had at no time applied for representation by that Union.

The Board's records indicate that the certification in question of Local 1081 of the Labourers' Union took place back in 1973. You do not state whether you were employed at Thomas Construction at that time. In any event, it is clear that the Union demonstrated the required degree of support of employees in order to be certified at that time.

Once a trade union obtains bargaining rights, it continues to represent the employees in that bargaining unit unless and until such bargaining rights are terminated in accordance with the *Labour Relations Act*. If the majority of employees decide that they no longer wish to be represented by the trade union, the Act makes provision for termination of bargaining rights as long as it is done in

timely fashion and in accordance with the proper procedures. Information about the timeliness and procedures for termination are summarized at pages 47-50 of *The Guide to the Labour Relations Act*, a copy of which is enclosed herewith.

If after reading those papers you feel that you have the required support for a termination application and that such an application will be timely at this time, you may wish to pursue the matter before the Board by filing a formal application on the appropriate forms available from this Board. The Board cannot entertain a request for termination unless a formal application is filed in the appropriate forms. Under section 57(2) of the Act, to have any chance of success at least forty-five per cent of the employees in the bargaining unit must voluntarily signify in writing that they no longer wish to be represented by a trade union. If such an application is made in timely fashion, the Board conducts a vote to ascertain the wishes of the employees. If a majority of those voting vote against the union, the Board decertifies the trade union. In deciding whether to pursue the matter before the Board you may consider obtaining legal advice from a solicitor.

I trust that this letter has been of some assistance to you."

The letter prompted the following correspondence from the applicant:

"In answer to your letter from May 13, 1982 I would like you to know that I was not aware that we as employees of Thomas Construction (Galt) Ltd. had any connection with the Labourers' Union Local 1081. It was through a grievance filed by the Union that the Company made me aware of it.

I have been employed with Thomas Constr. since 1969 and I am aware that at a certain job in 1973 they did employ Union Labour. After checking this out with Thomas Constr. they did advise me that there never was a signed agreement.

As far as Union Certification this was never posted or mentioned at that time at any other Construction site or at the shop where as a truckdriver and yardman I am mostly employed. As far as I am concerned there is *no* Union *no* agreement and *no* certification *if* however you feel that there was a proper certification I would like you to forward me the proper forms for Decertification."

On June 3, 1982 the applicant was sent blank forms and a copy of the Guide to the Labour Relations Act. On June 15, 1982 the applicant sent the following letter to the Board:

"As I have written to your solicitor Nimal Dissanayake on May 31, 1982, that I have been employed with Thomas Construction (Galt)

Ltd. since 1969 I have never been approached nor have I contacted the Labour Union Local 1081. It was through a grievance from them against me, that I have been made aware that there is a Union involved.

For this reason alone I cannot understand how the Labour Board can certify a Company, where the employees are not even aware of the situation and not even have a vote. Our basic democratic right!!!

I don't know if form 17 is the proper form to use as I don't believe that we are certified, but it seems to me the only option left under the circumstances."

Subsequently, on June 28, 1982 the Board recieved an application in Form 17 dated June 22, 1982. That prompted the following letter from the Board's Senior Solicitor:

"Your letter of June 15, 1982, and a termination application which was filed with the Board on June 24th, 1982, has been directed to my attention.

Your letter questions how the Labour Relations Board could certify a trade union, when you, as an employee of the company were never approached, nor have you contacted the union.

In order for the Board to certify the union, it must have been satisfied at the relevant time that the union represented the requisite number of employees in the bargaining unit. The certification of the trade union in 1973 gave the union the right to bargain with the employer on behalf of the employees in the bargaining unit it represented. If the union reached a collective agreement with the employer then the bargaining rights which the union now holds flows, not from the certificate but from the collective agreement between the employer and the trade union.

Your application for termination of bargaining rights is unclear. Paragraph five of your application states "other relevant statements: No proper certification". It is unclear from your application under what section of the *Labour Relations Act* you are seeking termination of the trade union's bargaining rights. Furthermore, the bargaining unit description which is required in order to process the application is the description in the bargaining unit in the collective agreement between the union and your employer or if there is no agreement, and never has been an agreement, then it would be the description in the certificate issued by the Labour Relations Board.

The earlier letter to you from Mr. Dissanayake outlines the procedure whereby an application can be made for termination of bargaining rights pursuant to section 57 of the *Labour Relations Act*. That letter also enclosed a Guide to the *Labour Relations Act* which

referred to other provisions of the Act dealing with termination of bargaining rights which may be relevant to your situation.

Under the circumstances, the Board cannot process your application until you indicate which section or sections of the *Labour Relations Act* you are relying upon in order to obtain a declaration terminating the union's bargaining rights, and provide the Board with an address for the respondent trade union, together with a bargaining unit description.

I am returning your application to you so that you may file it after supplying the information needed to process it."

After the above letter, the present application was filed by the applicant by registered mail on July 29, 1982.

5. The foregoing exchange of correspondence is based on the fact that at the time of the first letter by the applicant, Mr. Zondag, to the Labour Relations Board, there was before the Board another proceeding involving the referral of a grievance to arbitration under section 124. Those proceedings were before the Board and the issue in these proceedings at that time was whether or not the respondent trade union had bargaining rights with respect to labourers employed by the intervener. That matter was before another panel of this Board and a decision was not issued until July 9, 1982. Thus, prior to July 9, 1982, Mr. Zondag could not refer to either a collective agreement to which the respondent was party or a certificate by which the respondent obtained bargaining rights since the only certificate dealt with the Counties of Brant and Norfolk.

6. The respondent argues that this application was not made within the appropriate time limits set out in the *Labour Relations Act* and that the Board could not consider any of the earlier applications or correspondence as sufficient to constitute an application for termination of bargaining rights. In the circumstances of the present case, we cannot accept this argument by counsel for the respondent. There is no doubt that the present application would have been timely had the letter from Mr. Zondag dated April 28, 1982 been accepted as an application for termination of bargaining rights notwithstanding that it was not filed in Form 17. The Board has in previous cases allowed letters such as the letter of April 28th to be accepted as timely application for termination of bargaining rights. (See, for instance, *M. G. Burke Investments Ltd.*, [1978] OLRB Rep. June 549 at 551). In so doing, the Board examines the document and uses section 84 of the Board's Rules of Procedure which reads as follows:

"No proceeding under these Rules is invalid by reason of any defect in form or any technical irregularity."

Under this provision of this rule the Board has the power to relieve against such circumstances as in the present case. Clearly, the correspondence from Mr. Zondag indicates a desire to apply to the Board for termination of bargaining rights. The fact that at the time he could set out no more than what is in the letter of April 28th is not surprising, since no one knew the status of affairs between the respondent, the

intervener and the employees until the Board's decision of July 9, 1982. In these circumstances, therefore, we are prepared to accept the present application as having been filed on April 28, 1982, that is, within the time limits set out in section 57 of the Act.

7. We turn now to the second preliminary objection raised by counsel for the respondent, that is, that section 57 contemplates an application which can only be made by an employee in the bargaining unit. The respondent goes on to argue that Mr. Zondag is an employee of the intervener whose employment is contrary to the union security provisions of the collective agreement in force between the respondent and the intervener. (Indeed, enforcement of the union's security provision is one of the issues before the panel of the Board dealing with the section 124 grievance referral referred to above). Counsel for the respondent argues that section 57 of the Act should be interpreted in a manner such that only those employees lawfully employed in the bargaining unit are entitled to make an application for termination. In support of this proposition he cites the Board's decision in *April Waterproofing Limited* [1981] OLRB Rep. Nov. 1577. That case was a displacement application in which one union was seeking to displace another union as bargaining agent. In that decision the Board found as follows:

"7. The displacement of one union's bargaining rights by another is by no means rare in the construction industry. Such cases generally involve situations where the applicant union has won over the allegiance of members of the incumbent union who were hired by the employer in accordance with the provisions of the incumbent's collective agreement. The instant case, however, involves an entirely different situation. Here, the respondent did not hire the three individuals in dispute through the intervening union as required by the terms of the relevant collective agreement, but rather, it hired them "off the street". The applicant in turn seeks to displace the intervener's bargaining rights on the basis of the fact that two of the individuals so hired are its supporters.

8. There can be little doubt but that at the relevant time there existed a common-law employee-employer relationship between the respondent and the three individuals challenged by the intervener. That by itself, however, is not determinative of their status as bargaining unit employees. See *Local 273, International Longshoremen's Association v. Maritime Employer's Association*, [1979] 1 S.C.R. 120. In our view, the bargaining unit is comprised of employees employed under the terms of the applicable collective agreement. To be so employed, an employee must have been hired in accordance with the provisions of the agreement. The three individuals in dispute were not hired in accordance with the provisions of the collective agreement and accordingly, in our view, they do not come within the bargaining unit covered by the collective agreement. This being so, we are satisfied that in ascertaining the number of employees in the bargaining unit for the purposes of section 7(1) of the Act, the three individuals in dispute should not be taken into account."

8. Thus, the respondent argues in the present case that Mr. Zondag and the other employee not having been properly hired through the hiring hall should not be viewed as employees in the bargaining unit for the purposes of section 57(2) of the Act.

9. The Board's decision in *April Waterproofing Limited* clearly deals with a situation where the employer in hiring the employees questioned, intended to avoid the incidence of his collective bargaining obligations and, indeed, the Board's reasoning in the *April Waterproofing Limited* case strikes at a possible method of easy abuse by employers, particularly in the construction industry in relation to representation matters before this Board. Thus, for example, on a termination case an employer could choose to avoid his obligations under a collective agreement to seek employees from a trade union's hiring hall and employ persons from either another trade union or totally antithetical to construction trade unions at the time when the open period for the collective agreement is approaching. In such circumstances, it would not be surprising if another union were to apply for certification or if the employees were to apply for termination of bargaining rights. The employer would have "fostered" such a representation application by laying the necessary ground work simply by avoiding his collective bargaining obligations with the trade union representing employees in a particular bargaining unit. In such circumstances, the Board would rely on the *April Waterproofing Limited* decision to find that the employees in question were not lawfully or not properly employees in the bargaining unit in a subsequent representation matter.

10. It is difficult, however, in the present case to suggest that Mr. Zondag and the other employee involved in this application fall within the concern of the Board expressed in the *April Waterproofing Limited* decision. Here Mr. Zondag was an employee of the intervener in the Kitchener-Galt area before the time when the respondent trade union obtained bargaining rights for the Counties of Brant and Norfolk (upon which the present bargaining rights of the respondent are ultimately based). Mr. Zondag and Mr. Orosz are longstanding employees of the intervener. Indeed, one cannot help but note that the argument that they have been employed contrary to the union security provisions of the respondent's collective agreement is based on their being in a bargaining unit of construction labourers. Otherwise, if they were not in a bargaining unit of construction labourers, the respondent could not claim a violation of any union security provision.

11. In the present circumstances, therefore, we will not interpret the *April Waterproofing Limited* case as suggested by counsel for the respondent, and we are, therefore, prepared to find that Mr. Zondag was an employee in the bargaining unit at the time the present application for termination of bargaining rights was made.

12. In view of the foregoing, the preliminary objections by counsel for the respondent to the present application are dismissed.

13. The Registrar is directed to list the matter for continuation of hearing at which point the Board will inquire into the origination, preparation and circulation of the documents relied on by the applicant in support of its application for termination in the present matter.

1162-82-R United Steelworkers of America, Applicant, v. Walbar of Canada Inc., Respondent, v. Group of Employees, Objectors.

Membership Evidence – Petition – Practice and Procedure – Petition not affecting union's support for automatic certification – Board not ruling on petition or counter-petition – Form 99 disclosing irregularities – No cause for Board to make further inquiry – Isolated and limited incidents of intimidation unrelated to collectors – No pattern of intimidation – Board not inferring further irregularities from fact that large number of employees recent Vietnamese immigrants

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members C. G. Bourne and W. F. Rutherford.

APPEARANCES: *Brian Shell, Lorne Richmond, Michael Lynk, Gerry Barr and Marion Tobin for the applicant; D. N. Corbett, T. E. Long, C. J. Wodar and D. F. Hunter for the respondent; Cyril J. Abbass, Michael Giguere and Brian Smith for the objectors.*

DECISION OF THE BOARD; November 9, 1982

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent company at its Aerowood Drive location in the Municipality of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitutes a unit of employees of the respondent appropriate for collective bargaining.
4. The Board at the hearing found there to be 342 employees in the bargaining unit at the time of the application. Of those 342 employees, 248 signed applications for membership in the trade union and paid their dollar prior to the terminal date fixed by the Board. There was also a timely statement in opposition to the application filed with the Board. This statement contained the signatures of 82 persons, 10 of whom were individuals who had also signed applications for membership in the trade union. Finally, the applicant trade union filed prior to the terminal date statements re-affirming support for the applicant and repudiating any signature on a petition, signed by 222 employees in the bargaining unit. Of these 222 signatures on the "counter- petition", 5 overlapped with signatures appearing on the "petition" or statement in opposition to the application.
5. From the foregoing, two things became apparent at the hearing. Firstly, the applicant had filed with the Board membership support representing some 72% of the bargaining unit, and significantly above the 55 per cent required by the *Labour Relations Act* for certification without a vote. Secondly, because of the limited number of overlaps between employees signing cards in the application and those signing the petition in opposition to the application, the petition, even if proven to be voluntary,

could not reduce the applicant's unequivocal evidence of support anywhere near the 55 per cent level. Counsel for the objectors, however, sought to call evidence on the petition in order to show the Board that some 77 employees whom he represented desired the Board to order a vote in this matter. The parties thereupon agreed to have the Board accept counsel's statement as a fact, and further agreed that it would be unnecessary for any party to call evidence on either the petition or the counter-petition. The Board was accordingly not called upon to make any ruling in this regard.

6. The Form 9 "Declaration Concerning Membership Documents" filed by the applicant disclosed certain irregularities which the Board, in accordance with its usual practice, disclosed to the other parties at the hearing. It appeared that the applicant, because of the size of the campaign, had engaged the assistance of rank-and-file employees at both a primary and secondary collecting level. That is, certain individuals were engaged in collecting dollars directly from the employees themselves, while others collected the dollars from these "collectors" and remitted them to the applicant's organizing office. The Form 9 declarant indicated that the inquiries which it carried out prior to the execution of the Form disclosed that 33 of the cards submitted initially bore the signature of the secondary, rather than the primary collector. These cards were amended by having the primary collector sign, and new cards were made out and signed as well. A further irregularity disclosed in the Form 9 involved the signing of the receipt portion of an application for membership by both the member and the collector two weeks prior to the dollar actually being paid. With respect to the group of 33 cards, the Board, for the reasons given at the hearing, ruled that the discoveries and disclosures made by the Form 9 declarant in fact *reinforced* the declaration set out in that Form, and that the Board had nothing before it which would cause it to conduct any further inquiry behind the Form 9. The Board noted that even the irregularities discovered did not suggest any omissions which would go to the heart of the membership evidence required by the Act. With respect to the single card for which a receipt was signed at a time when no dollar was paid, the Board noted that that disclosure might prompt an inquiry at least into the circumstances and basis on which that occurred; but in view of the fact that that collector was involved with only two additional cards, no material purpose would be served by further inquiry in this case. Even if the Board were to conclude that all 3 cards signed by this collector were unworthy of weight, the applicant's membership level would not be significantly affected.

7. The remaining matter to be dealt with by the Board were the charges filed by the respondent in connection with the applicant's organizing campaign. The charges developed before the Board involved various forms of threats; none of these threats, however, were attributed by the respondent to officials or even employee-collectors of the applicant; nor in the case of certain telephone calls and scribbles on a washroom wall, could the perpetrator of the threats be identified at all. The respondent made it clear that it was not alleging wrongdoing on the part of the applicant; rather, it wished the opportunity to persuade the Board that the "climate" existing in the plant during the organizing campaign was so obstructive of freedom of choice as to cause the Board to exercise its discretion under section 7(2) of the Act to order the confirmatory evidence of a representation vote. The respondent emphasized that it was very difficult for it to obtain particulars of such conduct, given the nature of the conduct as well as the delicate nature of an employer's role in an organizing campaign.

8. The applicant argued, in light of the absence of any charges levied specifically against *it*, and the lack of particularity in certain of the respondent's allegations, that the Board ought to refuse to receive the evidence tendered by the respondent, and effectively dismiss the charges without a hearing. Whether the Board will consider it appropriate to do so, however, depends on the overall circumstances of each case, and the majority ruled at the hearing that in light of the serious improprieties alleged, and the fact that the respondent had specifically identified *some* instances of attempted intimidation, and was prepared to lead evidence in support thereof, the Board would hear that evidence. While sensitive to the difficulty of probing the authenticity of such evidence, the Board was not prepared to state as a general rule that it would have no interest in inquiring into relevant conduct however serious, so long as such conduct was carried out anonymously, or by someone not specifically a party to the proceedings. With respect to both the limitations and relevance of such evidence, the Board noted its earlier comments in *Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331, at paragraph 13:

Unfortunate as it may be, it is not uncommon for antagonism to be generated between employees who line up on opposite sides of a campaign for union representation. Statements by any person amounting to intimidation or coercion of an employee, whether they are made for or against a union, are clearly contrary to section 70 of the *Labour Relations Act* and are grounds for a complaint under section 89 of the Act. They may also form the basis for criminal charges. It does not follow, however, that the indiscretions of employees, whether they favour a union or sympathize with their employer, are to be held against the principal parties to an application for certification. The Board can no more hold against union a verbal threat made to an employee's job security by an indiscreet employee who is neither a union officer nor a collector of union membership cards than it can hold against an employer similar threats made by a fervently anti-union employee acting on his own. Evidence of widespread threats which are made by neither the employer nor the union might, of course, cause the Board to resort to the further evidence of a representation vote.

In the present case the Board deemed it appropriate to hear the evidence of intimidation prior to making a determination of its impact.

9. The respondent's first witness was Mr. My Ngo. Mr. Ngo was born in Vietnam, and emigrated to Canada via a refugee camp some 1½ years ago. Mr. Ngo testified that many people told him that if he didn't join the union, then once the union was established, he might be kicked out of the company. He indicated that he could not recall specifically who had said this to him, but that they were his friends and he did not take them seriously. More significantly, Mr. Ngo testified that after he signed the paper protesting against the establishment of the union, he received anonymous telephone calls at his home on five occasions, asking him why he was protesting against the establishment of the union, and warning him that he might be harmed or killed on the way to work. Mr. Ngo could only say that one of the callers was a male, another a female. Mr. Ngo reported these incidents to the police. Mr. Ngo was served with a summons by the

company to appear before the Board, and indicated that he received a further anonymous telephone call telling him not to appear at the Board as a witness. The day before the first hearing he observed on a washroom wall at the workplace some words in Vietnamese which he translated as: "If you want a wage increase, contact the hunting dog Ngo Ngoc My". Mr. Ngo testified that the word "hunting dog" was not complimentary, and was another way of saying "company spy".

10. The respondent's next witness was Mr. Tran Van Long. Mr. Tran also emigrated to Canada from Vietnam by way of a refugee camp approximately 2½ years ago. He is an employee at Walbar and was called into the office one day for the purpose of being interviewed by the company's lawyer. That night at home he received a telephone call asking him why he went to the office, whom he saw, and what he told them. Mr. Tran responded that he did not know who the caller was, nor why he was so concerned about the matter. The caller did not identify himself, but told Mr. Tran that if he did not tell him, he would kill Mr. Tran, his wife, and his children. The caller ended the conversation by saying that he would call the next day, but never did. Mr. Tran testified that he was so scared by all of this, because he thought that Canada was a peaceful country, and he reported the matter to the police and his employer. He said that he received a summons the next day from the company to testify before the Labour Relations Board, but was reluctant to do so because of his fear. He indicated that he also discussed the matter with Mr. My, who is a friend of his, and who had told him previously that he had been threatened as well. The applicant then disclosed in cross-examination that Mr. Tran was an employee who had signed an application for membership in the trade union. One of the charges pending before the Board involved an allegation that the non-English-speaking employees in this bargaining unit did not know what they were signing when they signed their membership cards, or did not appreciate the full significance of what they were doing. Accordingly, counsel for the objectors, following the applicant's questioning, cross-examined Mr. Tran extensively on this point. Mr. Tran indicated that he knew that he was signing a card in order to bring the union into the workplace, and that it was explained to him that if enough employees signed these cards, the union would be established. He said that there was no mention of a vote being held concerning the union, nor did anyone tell him how many other employees had signed cards. Asked if he really felt that he had a choice when presented with the card to sign, Mr. Tran responded: "Yes - it was my own freedom, my choice".

11. The final witness called by the respondent was Mr. Duson Gracanin. Mr. Gracanin is a native of Yugoslavia, and is employed as a machine operator at Walbar. He testified that a number of the employees were sitting around a table in the cafeteria one day discussing the pros and cons of joining the trade union. One employee in particular, Ilaja Djuric, he noted was strongly in favour of the union. About a half hour later, Mr. Djuric approached Mr. Gracanin at his work bench. Mr. Djuric asked Mr. Gracanin if he realized what would happen if the majority was not for the union. Mr. Gracanin asked him what he meant by that and Mr. Djuric responded only that Mr. Gracanin had better be careful, whether at work or in the car or at home, because Mr. Djuric was not sure what could happen to him from the Mafia. Mr. Gracanin said that he had nothing to do with the Mafia, and asked Mr. Djuric what Mafia he was talking about. Mr. Djuric replied that he did not know what could happen from the Chinese Mafia, the Vietnamese Mafia, the Portuguese Mafia, or the Italian Mafia. Mr. Gracanin

responded that if anyone were to touch his finger, he would break their hand. Mr. Gracanin testified that he thought Mr. Djuric was "kibbutzing" at the time, but that he took it more seriously when he heard Mr. Djuric saying the same thing to others later. Mr. Djuric did not at any time offer Mr. Gracanin a membership card to sign. As for his own participation in discussions about the union, Mr. Gracanin indicated that he took part initially, but decided to stay out of it when things began to get "hot". On further questioning, he confirmed that the change in atmosphere took place after the green sheet was posted from the Labour Board.

12. Called by the applicant in reply, Mr. Djuric denied having this or any other conversation with Mr. Gracanin about the union. In fact, Mr. Djuric twice denied ever having a conversation with anyone about the subject of the union. He was then able to recall at least one occasion in the cafeteria in which he and a number of other employees, including Mr. Gracanin, were discussing the union, and in which Mr. Djuric asked a number of questions. On the whole, he testified, he "tried very strictly not to involve" himself in the union matter. Having considered the breadth of Mr. Djuric's denials, together with the course of his evidence, the Board finds that it has no reason to disbelieve the evidence of Mr. Gracanin.

13. The parties agreed to stipulate a number of additional facts before the Board, without the need to call evidence. Of the 342 employees in the bargaining unit, approximately 118 are of Vietnamese origin, and another 32 have emigrated from countries in Asia other than Vietnam. The majority of these 150 employees experience difficulty with the English language. The respondent proposed to call as an expert witness Professor David Wurfell of the University of Windsor. Mr. Wurfell was put forward as an expert on the Vietnamese community in Canada on the basis of his studies in the Far East, as well as his efforts in the re-settlement of Vietnamese refugees in Canada. The applicant objected to either the propriety or probative value of such evidence. However, solely for the purpose of expediting the proceedings, the applicant agreed to permit the respondent's counsel to stipulate as facts before the Board a series of points which the respondent sought to establish through its expert witness. As a result of this procedure agreed upon by the parties, the Board once again was not called upon to make a ruling on the admissibility of the tendered evidence. The agreed-upon statement of points provides:

1. Vietnamese refugees have come from a society which has suffered war for some forty years.
2. It was common in the war-torn society for people to threaten others and in the context of this society for these threats to be carried out.
3. Threats during union organizing campaigns in Vietnam were made by both union organizers and representatives of management.
4. The divisions in the Vietnamese community which existed in Vietnam have to some extent been transported to Canada.

5. Threats of violence made by a refugee from Vietnam to another refugee from Vietnam may come to the attention of persons not belonging to the Vietnamese community in Canada, but in many instances the people may be fearful of making any revelation to persons outside the Vietnamese community.

This completed the evidence and facts which the Board has before it.

14. The respondent argues that the evidence of intimidation should cause the Board sufficient doubt and concern as to seek the confirmatory evidence of a representation vote as to the true wishes of the employees in the proposed bargaining unit. Counsel points in particular to the nature and timing of some of the threats, being designed to thwart communication of the incidents of intimidation, even with respect to the proceedings before the Board itself. While conceding that the evidence disclosed somewhat isolated incidents of intimidation, counsel argues that the issue which the Board must address is: Is there a pattern? For that pattern, counsel argues that one can look to the long history of intimidation characteristic of organizing campaigns in Vietnam itself, as set out in point #3 of the stipulation of facts. Counsel points further to the fact that at least two incidents of intimidation have come to light, and to the stipulated fact (#5) that incidents of this nature may not be communicated beyond the Vietnamese community itself, and asks the question: How many more incidents are there that we do not know about? In summary, counsel argues that it is simply contrary to common sense for the Board to treat refugees from this war-torn nation in the same way as any other employee in Canada. Counsel submits therefore that the only reliable means of testing the wishes of employees in a bargaining unit with so high a content of Vietnamese refugees is a secret-ballot vote. The respondent asks that a quick vote be taken of all employees in the unit, and undertakes not to campaign in the election. The respondent asks only that the Board make it clear that employees have a choice whether to vote for or against the trade union, and that no one will ever be permitted to know which way any individual employee has voted.

15. Counsel for the objecting employees takes a somewhat different tack. He argues that the Board's Form 6 "Notice to Employees" is misleading, in that it does not make clear to employees that the only evidence of opposition to certification which the Board considers relevant is a statement in opposition signed by employees who previously signed cards in the applicant. Nor, in counsel's view, did the interval between posting of the form and the terminal date allow sufficient opportunity for objecting employees to figure out what the form meant, retain competent counsel, and collect written evidence of opposition for filing with the Board by the terminal date prescribed. Counsel therefore argues not for a quick vote, but for a vote delayed long enough for objecting employees to campaign effectively against the certification of the applicant. In further support of his request for a vote, counsel argues that the present case is unique, in that the Board normally does not have before it the stipulated fact that employees who signed the statement in opposition actually were seeking a representation vote from the Board.

16. The applicant in response to the other parties' submissions points out that no objection was taken at any point in the proceedings to the Form 6 posting, or the fixing

of the terminal date, all of which was done wholly in accordance with the Board's rules and practice. Counsel points out that there is not one iota of evidence of misrepresentation, intimidation or coercion in connection with the securing of membership evidence in this case. The evidence, rather, related to a time period subsequent to the gathering of the applicant's membership cards, and is not even alleged to have involved persons who performed a collecting function in the applicant's organizing campaign. With respect to the existence of a "pattern", the applicant points out that only three employees have given evidence that they were in any way the victims of attempted intimidation, out of a bargaining unit of 342. While the applicant vigorously denounced and abhorred the existence of *any* such conduct or threats, it argued that their magnitude in the present case fell markedly short of the "widespread threats" contemplated by the Board in *Alderbrook Industries*, cited above ([1981] OLRB Rep. Oct. 1331). Counsel argued that it is wholly improper for the Board to make assumptions as to what "might" have happened based on a particular class of employees, as the Board itself made clear in its decision in *Dylex Limited*, [1977] OLRB Rep. July 357. To attempt to make such generalized distinctions as is urged in this case would engage the Board in a never-ending comparison of different societies around the world, depending upon the makeup of the particular bargaining unit in question. Counsel pointed out that it had demonstrated membership support for some 72% of the bargaining unit of 342 employees, which is itself composed of not more than 118 employees of Vietnamese origin. Finally, counsel pointed to the scheme of the legislation in this province which makes cards, and not representation votes, the starting point as evidence of employee wishes, and cited the recently released decision of the Board in *Baltimore Aircoil Interamerican Corporation*, [1982] OLRB Rep. Oct. 1387 in support.

17. The Board agrees with the arguments put forward by the applicant in this case. The scheme of the Act in place in this province clearly establishes that, as a starting point, evidence of membership in excess of 55% of the bargaining unit will normally entitle an applicant to certification without the additional step of a representation vote. Section 7 provides:

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j).

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade

union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

The discretion entrusted to the Board under section 7(2) is an important safeguard for employee wishes; but the Board has always made it clear that it will be exercised only for compelling reasons, and on the basis of cogent evidence. See, e.g. *Cleveland-Cae Metal Abrasive Limited*, [1979] OLRB Rep. Feb. 81; *General Motors of Canada*, [1980] OLRB Rep. Oct. 1437; and compare, *Thames Steel*, [1981] OLRB Rep. April 545. Most recently in *Baltimore Aircoil*, *supra*, the Board reflected on its normal response to the presence of both a voluntary petition and counter-petition, and at paragraph 49 wrote:

... The apparent rapid changing of minds on the part of three employees can be explained as a protective response in signing the petition (and, thus, the voluntary execution of the counter-petition when that document was made available to them), as a product of peer pressure (a condition which afflicts all campaigning), or as a product of true confusion or indecisiveness. Given the concern of the statute for confidentiality, it is seldom possible to ascertain if the last factor exists and is the principal cause for the petition and counter-petition. To order, as a general matter, a representation vote in such circumstances would give undue weight to this possibility and ignore the emphasis the statute places on membership cards as the method of determining employee wishes where this support is in excess of fifty-five per cent.

(emphasis added)

On the other hand, it is not true, as the objectors and respondent argued, that the Board will exercise its discretion only on the ground that a sufficient number of employees who had signed membership cards voluntarily signify in writing that they have changed their mind. The Board's discretion under section 7(2) is an unfettered one, and the Board has never placed arbitrary limits on the type of relevant evidence which it will be disposed to consider. See, e.g. *Primo Importing and Distributing Co. Ltd.*, [1981] OLRB Rep. July 953, at paragraph 16. It has, for example, on a number of occasions, resorted to the confirmatory evidence of a representation vote even in the case of wholly isolated incidents of intimidation or other impropriety, so long as the conduct complained of involved someone connected to the membership drive in a significant way, and related to the manner in which cards were sought to be obtained. See *PRC Chemicals*, [1980] OLRB Rep. Dec. 1805; *Crock and Block Restaurants*, [1980] OLRB Rep. April 424, and the cases cited therein.

18. The type of conduct complained of here is clearly objectionable, as the Board observed in *Alderbrook Industries*, *supra*. And as the Board also observed in *Aldebrook Industries*, while no basis would exist on which to "punish" an applicant trade union for acts that are not its own, the inability to control one's supporters could conceivably lead to conditions in which the Board simply could not repose full confidence in signed cards as the only evidence of employee wishes. But the Board must have hard evidence to cause it to arrive at that conclusion.

19. What does the Board have before it in the present case? One employee received serious threats by telephone discouraging him from continuing to oppose the union, and a message was scrawled upon a washroom wall disparaging that individual's relationship to the company. A second employee was interrogated anonymously as to his disclosures to the company, and then threatened as well. And a third employee was warned to beware of the Mafia, by a fellow employee appearing to be a strenuous supporter of the union. Does this disclose a "pattern" – and in particular, a pattern from which the Board can draw inferences on the manner in which membership evidence was obtained? The Board finds that it does not.

20. Firstly, the very limited number of incidents alone, in a bargaining unit this size, speaks against the finding of a pattern. Secondly, none of the incidents involve the collection of membership evidence, or even persons directly involved in the collection of membership evidence. The "threat" from another employee to Mr. Gracanin about the various "Mafia" appears to be one to which a reasonable employee could attach the appropriate little weight, and Mr. Gracanin appears to have done so in his response to Mr. Djuric. As far as the Vietnamese community is concerned, only two incidents, neither relating to the collection of cards, have come to light. There is simply no probative evidence before the Board on which to speculate what other incidents "might" have occurred, about which we have no knowledge. To do so solely on the basis of general characteristics attributed to a particular society by expert evidence would, apart from anything else, necessarily lead the Board to conduct similar analyses of *all* societies outside of Canada, or perhaps even outside the industrial norm of this province, whenever the origin of particular employees was placed in issue. One cannot simply state at the outset, as the respondent has suggested, that this is a problem which could arise *only* in connection with the unique and unfortunate history which is Vietnam's. Indeed, one can, with only a moment's reflection, call to mind any number of countries in the world for whom violence and intimidation have formed an all too prominent part of their recent past. The Board would presumably not be entitled to decide which other societies fall within the same "class" as Vietnam without permitting the same kind of inquiry as was urged upon the Board in the present case. And in each case the Board would be required to form its conclusions in a most dangerous and unsatisfactory way, not on the basis of the first-hand knowledge and experience in labour relations for which its members are appointed, but on the advice and opinions (conceivably competing) of expert witnesses on questions of cultural characteristics in foreign places.

21. With respect to the stipulated cultural facts, the conclusion which the respondent asks the Board to reach with respect to the society of Vietnam would cause the Board to effectively amend the *Labour Relations Act* of the province to provide for no possibility of certification without a vote in cases where a particular class of employees is involved (e.g. Vietnamese), but rather to call for a vote in every such case, because of cultural characteristics. The two isolated incidents of threats, unrelated to the collection of cards, present in this case are insufficient to allay what the Board sees would be the real effect of the respondent's argument; the Board, in the final analysis, would be ordering a vote only because the employees in question are Vietnamese. Nor is it at all clear how significant a number of "foreign" employees, be they Vietnamese or otherwise, are to be deemed sufficient to cause the Board to engage

in the kind of inquiry put forward by the respondent. Here the Vietnamese immigrants constitute about a third of the work force. Would the same inquiry have to be engaged in by the Board if the foreign component were only, say, 5 per cent, but the applicant's membership component were closer to the level of 55 per cent?

22. All of these considerations are adverted not to demonstrate how difficult a task the respondent would be urging upon the Board (for difficulty alone would be no basis for refusing to exercise our discretion), but rather to point out how arbitrary, speculative and devoid of probative value would be that kind of inquiry. In that sense, the issue is not wholly unlike that in the *Dylex* case cited by the applicant ([1977] OLRB Rep. July 357), where the Board observed:

4. It is apparent from the evidence that many of the employees in the bargaining unit are fairly recent immigrants to Canada who possess only minimal knowledge of the English language. During the course of the hearing counsel for the applicant called as a witness Mr. Franco Savoia. Mr. Savoia, who is a native of Italy, holds degrees in psychology and theology and has for some nine years been involved in the formation and operation of various programs aimed at providing assistance to ethnic communities in the Toronto area. Mr. Savoia is currently the regional director of the Young Men's Christian Association in West Toronto. It was the contention of the applicant's counsel that Mr. Savoia should be allowed to testify as an expert witness so as to permit him to give his opinion as to how immigrants might be affected by certain pieces of literature distributed by the respondent prior to the taking of the representation vote. The Board, however, declined to allow Mr. Savoia to give opinion evidence in this regard on the grounds that the subject matter was not a proper one for expert testimony. It was the Board's ruling that although the Board itself might be required to draw certain conclusions as to how employees in the bargaining unit would likely be affected by the respondent's pre-vote propaganda, those conclusions would be based only upon the objective evidence before it and upon the Board's own experience in such matters. (In this regard see *Adam v. Campbell*, [1950] DLR 449 wherein Cartwright J. in delivering the majority judgment of the Supreme Court of Canada adopted (at page 458) a statement from the 8th edition of "Phipson on Evidence" to the effect that neither experts nor ordinary witnesses may give their opinion on the manner in which persons would probably act or be influenced.)

5. Related to the question of the admissibility of expert testimony concerning the possible influence of the respondent's pre-vote propaganda on immigrant employees was the applicant's strongly argued contention that in determining whether or not the respondent used undue influence contrary to section 56 of the Act, and as to whether or not the applicant should be certified pursuant to section 7a, the Board should take into account the fact that many of the bargaining

unit's employees are immigrants to Canada. It was counsel's contention that such persons were more likely to have been influenced by the respondent's propaganda than would non-immigrant employees. This is a proposition with which we are unable to agree. The Board is called upon with ever increasing frequency to concern itself with bargaining units comprised to a greater or lesser extent of fairly recent immigrants to Canada and it is not uncommon to have such persons testify for one reason or another before the Board. Our experience in this regard has taught us that employees who are immigrants are not, only because they are immigrants, somehow more easily influenced or more incapable of making their own decisions than are other employees. Some individuals appear to be possessed of greater fortitude than do others. Similarly there are some individuals who by their very nature may be easily influenced and who tend to perceive threats in circumstances where most others would not. However, these are reactions which appear to be based on individual temperament and character rather than on any general characteristics of language or former country of residence. This being the case we are of the view that no inferences can be drawn as to the possible susceptibility to influence of employees in the bargaining unit on the grounds only that many of them are immigrants from abroad.

Here the evidence of specific acts of intimidation is very much limited, and there is no evidence whatever of wrongdoing in connection with the collection of any membership cards. Indeed, what evidence there is was elicited from the respondent's witness, Mr. Tran, and is directly to the contrary. To ignore the applicant's 72 per cent membership strength and now order a vote on the basis of surmise as to what else *might* have happened, or of some generally-stated characteristics of one segment of society, is just not fair.

23. As to the arguments of the objectors, the Board notes, as did the applicant, that the posting of the "Notice to Employees" and fixing of a terminal date were done in accordance with the Board's rules and practice, and that no objection in that regard was made by any employees at the outset. The form itself advises employees of their right to file any objection to the application, and cannot be said to be misleading in this regard. It remains the duty of the Board, of course, to determine the relevance and effect of any objection so filed. To the extent that the Notice contemplates the collection of signatures in opposition to the application, the objectors did that, and *some* of the signatures they obtained corresponded with individuals who previously had evidenced a desire to be represented by the trade union. As it turns out, however, there were not enough of such employees changing their mind to overcome the initial success of the applicant's campaign. On the evidence before it, the Board does not conclude anything other than that the objectors are on the short end of the count with respect to employee wishes.

24. Nor does the agreed-upon stipulation that the petitioning employees really wanted a vote alter the situation. The Board has actually been faced with such submissions on the face of petitions themselves, and noted that in those particular cases, the submissions did not amount to a "statement in opposition" to the union. For

example, in *Crown Cork & Seal Company Ltd.*, [1977] OLRB Rep. Sept. 606, the Board observed:

13. It cannot be inferred from the preamble that the employees who placed their signature under it categorically oppose certification of the trade union. . . . Seen in that light the petition is essentially an expression of disagreement with certification procedures under the existing legislation. It is not a categorical statement of opposition to the certification of the applicant union.

See also *The Diebold Company of Canada*, [1976] OLRB Rep. May 237. Whether the petition is viewed as categorical opposition to the application, or simply a request for a vote, the fact remains that it is only the expression of a minority in this case. As the Board noted earlier:

"... The majority principle is a cornerstone of the labour relations system which operates in this jurisdiction. The Board confers bargaining rights covering all of the employees in the bargaining unit found appropriate for collective bargaining when satisfied that the applicant trade union represents a majority of the employees. Having regard to the principle of majoritarianism as rooted in the Act, it is the [normal] practice of the Board to certify without a vote when satisfied that membership evidence within the meaning of the Act has been submitted on behalf of more than fifty-five per cent of the employees in the unit." *Cleveland-Cae Metal Abrasive Limited*, [1979] OLRB Rep. Feb. 81.

Even if all of the cards signed by employees who allowed their signatures to stand on the petition, or those collected by the employee found to have issued a receipt in advance of payment, were discounted, the applicant would still have before the Board unequivocal evidence of membership support on behalf of nearly 70 per cent of the bargaining unit. The Board has nothing of probative value before it which would cause it to deny the applicant a certificate.

25. Based on all of the material before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on September 29, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

26. A certificate will issue to the applicant.

2464-81-M Delmar McCormack Smyth, Applicant, v. The York University Faculty Association, Respondent Trade Union, v. **The Board of Governors of York University**, Respondent Employer

Religious Exemption – Board confirming importance of word “religious” in Act – Opposition to union due to belief that unionism contrary to charter and constitution of university – Legal analysis not grounded in religious conviction – Application dismissed

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. G. Donnelly and H. Simon.

APPEARANCES: *Gerald Vandezande for the applicant; C. M. Mitchell, J. Newson and M. L. Craven for the respondent trade union; no one appearing for the employer.*

DECISION OF THE BOARD; November 23, 1982

1. This is an application for religious exemption made pursuant to section 47 (formerly section 39) of the *Labour Relations Act*. The applicant is seeking relief from the compulsory dues checkoff provisions in the current collective agreement between the respondent York University Faculty Association (Y.U.F.A.) and York University. Section 47 reads as follows:

47.(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause 46(1)(a) do not apply to such employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted by the employer to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to so agree then to such charitable organization registered as a charitable organization in Canada under Part I of the Income Tax Act (Canada) as may be designated by the Board.

(2) Subsection (1) applies to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection (1) is first entered into with that employer and only during the life of such collective agreement, and does not apply to employees whose employment commences after the entering into of the collective agreement.

The basis for exemption set out in Professor Smyth's application reads:

As a Christian, in the Non-Conformist Protestant tradition, I believe in God as the immanent and transcendent, the indwelling and higher source and sustainer of all of life. I also believe that God has endowed human beings with capacities which enable them, of their own free will, to love and care for their fellow human beings and all creation and that such love and care necessarily preclude exploitation and manipulation. I believe further that each person should be granted:

- (1) the freedom to pray and to worship, to study and teach, peacefully in accordance with the light and understanding with which the indwelling Spirit of God illumines the mind and conscience of that person;
- (2) the freedom to associate, to pray and worship, to study and teach with those of similar beliefs. Such freedom necessarily includes the freedom not to associate with those who do not share such views;
- (3) the freedom to seek and respect the truth peacefully in accordance with his or her own personal understanding of truth and to use such understanding for the reconciliation of individuals and groups with one another.

Given my religious beliefs it follows that I am opposed to forcing individuals, as long as they are acting peacefully, to do things which are contrary to their conscience or to engage in actions which might entail hardship for third parties, that is persons who are not party to an agreement. I am unable to support the York University Faculty Association which insists on compulsory dues check-offs, which may be contrary to the conscience of individuals and certainly is in my case; and I am unable to support the York University Faculty Association's possible withdrawal of services, for instance through a strike, which would inevitably involve hardships for third parties.

In their search for truth I believe that academics have a special responsibility to be bound by truth in its totality not merely by a particular aspect of truth which may be exploited to the temporary advantage of oneself or the group to which one belongs. Because the York University Faculty Association has opted for the adversarial method rather than the co-operative approach I am unable to support it. To do so would be opposed to my religious commitment to reconciliation rather than adversarialism.

2. Before turning to the merits of the instant application, it may be useful to refer briefly to the way in which the Board has approached the interpretation of section 47 in other cases. It is against this background that Professor Smyth's position should be

considered. It should be noted at the outset, however, that the Board's ultimate decision in section 47 cases will inevitably be strongly influenced by its assessment of an applicant's demeanour and general credibility. Typically, the applicant's own words and actions will be the only source of information from which the Board must determine whether his beliefs are sincerely held, whether they are "religious", and whether they are really the cause for his objection to supporting a trade union (see *Helena Wybenga*, [1976] OLRB Rep. Aug. 422). As is perhaps obvious, it is relatively easy for an articulate and thoughtful individual, intentionally or unintentionally, to rationalize an objection to trade unions in religious terms in order to fall within the ambit of section 47. Doubts about an applicant's credibility merely complicate the already difficult task which the legislation requires the Board to undertake. And of course, in assessing credibility, the Board cannot restrict itself to the witness' direct evidence or some prepared statement setting out his position. It must also consider his performance in cross-examination. As in other litigation, cross-examination is an essential tool for probing and clarifying a witness' evidence.

3. Of the above-mentioned questions associated with the interpretation of section 47 (i.e., whether the applicant's beliefs are sincerely held, whether they are religious, and whether they are the cause of his objection), it is the second one which is often the most perplexing. In view of the remedial thrust of section 47, the Board has always been disposed to give the word "religious" a liberal interpretation. "Religion" can have a meaning which extends well beyond the established views of a particular sect, [see *Civil Service Association of Ontario Inc. v. Anderson*, (1976) 9. O.R. (2d) 341; *Funk v. Manitoba Labour Relations Board*, (1976) CLLC ¶14,006; *Klaas Stell v. The North York Civic Employees' union, Local 94, Canadian Union of Public Employees*, [1971] OLRB Rep. July 63; *Vis v. Sheraton Connaught*, [1972] OLRB Rep. March 249; and *Centennial College*, [1979] OLRB Rep. March 974] and the Board has consistently recognized that religion may be personal to the individual and need not be tied to any particular church or creed. On the other hand, it is obviously easier for an applicant to meet the test of section 47 if his beliefs form part of the dogma of a recognized religious sect. But again, this is largely a matter of credibility.

4. Counsel for the applicant contends that the Board has no jurisdiction to ascribe a meaning to the term "religious" in section 47, or to attempt to define what religion is. In his submission, if an applicant has sincerely held personal beliefs, that is sufficient to meet the requirements of the Act. Indeed, he goes further. He argues that if an applicant *asserts* that his beliefs are "religious", then the Board is bound to accept that characterization. He argues that the Board has no authority to decide that certain beliefs are "political", "secular", or "social" as opposed to "religious". Thus, he argues, if a Communist were to assert that his views are "religious" that is the end of the matter – even though some might consider such views "political" and others might regard them as the very antithesis of "religion".

5. This argument was considered and rejected in *Board of Governors of York University Re Douglas N. Butler* [1981] OLRB Rep. Sept. 1319. After reviewing a number of the earlier Board cases, the Board concluded:

16. What the applicant is in effect asking the Board to do is to legislate the word "religious" out of section 39 [now section 47]

altogether. This is not an appropriate function for the Board. Compromising between freedom of religion and egalitarian support for a trade union obligated by law to represent all employees in a bargaining unit is a delicate social issue (cf. again, *Vis, supra*), and falls properly within the purview of the Legislature. Had the Legislature chosen to grant the objection simply on the basis of "personal conviction", or "genuine belief", or "matters of conscience", it could easily have done so. But it did not. The section is not written simply for "conscientious objectors". As the Ontario Court of Appeal observed in *Donald v. Hamilton Board of Education* (1945) 3 D.L.R. 424, in considering the meaning of "religion" under the *Public Schools Act*, at page 429:

The fact that the appellants conscientiously believe the views which they assert is not here in question.

17. The Legislature having chosen to limit the exemption to matters of "religious" conviction or belief, it is the task of the Board to ascribe some weight to that word, and to attempt to distinguish the "religious" from the "non-religious". This becomes particularly cogent if the recently-enacted section 36a [now section 43], 1980, c. 34, s. 2(1), requiring the inclusion in a collective agreement, at the request of a trade union, of a provision effectively requiring all members of a bargaining unit to share equally the costs of their agent, is to maintain its integrity. It is the view of the Board that a conviction or belief, to be "religious" within the meaning of the section, must in some way relate to the more orthodox view of "religion" prevalent in the community. That is, the beliefs must relate to the Divine (in some form) and man's perceived relationship to the Divine, rather than to concepts which deal only with man-made institutions, and the relationship of men *inter se*. As the High Court of Australia noted in *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943), 67 C.L.R. 122, at pages 123 and 124, in defining the statutory limits on freedom of religion:

It is true that in determining what is religious and what is not religious the current application of the word 'religion' must necessarily be taken into account.

This is not to say, of course, that moral precepts may not form an important part of any religion. As the Court observed in *Anderson, Supra*, at 344:

It is trite to say that in some circumstance, or with respect to some individuals, matters of morality might well be quite separate and distinct from matters of religious belief. However, it does not follow that a matter of individual morality and conscience may not for some individuals be an important element or tenet in the religious convictions or belief.

Indeed, it might be argued that religion has no greater importance than in the moral precepts which it imparts, and on the basis of which an individual carries out his daily life. The Board is simply observing that the use of the term “religious” in section 39 [now section 47] appears to require more than merely a code of behaviour or system of wordly standards, standing alone. As McRuer C.J.H.C. noted in dealing with the related words, “creed”, in *Trenton Construction Workers Association, Local No. 52 v. Tange Company Limited*, (1963) 63 CLLC ¶15,459:

Whatever meaning one gives to the word “creed” it must involve a declaration of religious belief. Religious belief, theology and standards of ethical or social conduct are all very different things.

Nor is it sufficient for an applicant simply to state that his wordly standards evolve from his concept of God and God’s will. It is the task of the Board to satisfy itself that this is the case.

6. We endorse and adopt the approach enunciated in *Butler*. We do not think we can simply accept an applicant’s characterization of his convictions, nor is it sufficient that they are sincerely held. They must also be “religious”. However difficult it may be to define “religion” in particular cases (given that religious and secular beliefs may co-exist or be interrelated), the Board must ascribe some meaning to the words that the Legislature has used, and in so doing it is our view that the Board should be governed by their usual or accepted meaning in the community. That is what the Legislature presumably intended when the legislation was framed. Had the Legislature intended to broaden the basis for exemption beyond the “religious”, it could easily have done so. The concept of “dissent” is not unknown to the Statute (see Section 46(2)(c)). Had the Legislature wished to exempt “dissenters” or “conscientious objectors” language to this effect could have been drafted to accomplish that object. The Legislature did not do so – hence the enquiry into an applicant’s religious beliefs required by section 47.

7. Likewise, in each case the Board must decide whether the opposition to supporting a union is *because* of an individual’s religious beliefs. The fact that an individual has certain religious as well as other beliefs (political, for example) does not necessarily mean either that all his beliefs should be considered religious, or that all his behaviour necessarily has a religious motivation or cause. One will find religious persons who are opposed to trade unions or to a particular trade union. But it does not automatically follow that the religious beliefs are the cause for the objection. Nor must the Board unhesitatingly accept such assertion. There will be individuals whose lives are so animated by religion that one can fairly conclude that all of their views and all of their views and all of their conduct are inextricably connected to their religious beliefs. But in the Board’s experience such individuals are rare. Again, it is a matter of credibility.

8. We turn now to the evidence in the instant case. Professor Smyth told the Board that the members of his Family have been part of a non-conformist Protestant Christian tradition for some four hundred years. He grew up in a Christian household.

His mother was a practising Baptist, and his father was a Presbyterian. His father's ancestors were Quakers. Professor Smyth testified that, in consequence, he developed a profound respect for religious and intellectual dissent. He said that for him, truth and freedom were inextricably linked.

9. Professor Smyth testified that religion is an expression of what is ultimate, what holds life together. He indicated that, for him, academic freedom is a part of religious freedom. He is committed to truth and co-operation rather than coercion, manipulation or adversarial relationships. He said he has been a practising Baptist for many years, and for the last two years has also considered himself a Quaker. It was this latter affiliation which, Professor Smyth explained, prompted him to decline to give his evidence under oath. Professor Smyth has contributed to a variety of churches and charities and recently has both sponsored and supported a visiting foreign student. There is no evidence that the religious organizations with which Professor Smyth has been connected have any general doctrinal objection to trade unions.

10. Professor Smyth put before the Board a letter dated January 11, 1977, in which, *inter alia*, his religious beliefs were mentioned as one of the reasons for his opposition to any collective agreement provisions requiring compulsory membership in Y.U.F.A. In this respect, Professor Smyth's position is different from some of his fellow objectors from York University whose "Religious opposition" seemed to surface only much later, after all other efforts to oppose the union had failed and section 47 was the only option open. It was this spectre of the union's leading opponents, seemingly for the first time, and en masse, claiming religious exemption, which engendered the cynicism which counsel for the respondent made little effort to conceal. Nevertheless, as the Board pointed out in *Butler, supra*, each case must be considered on its own merits. An individual's prior actions opposing a trade union may well be motivated by precisely the same "religious conviction or belief" which underlies his request for exemption under section 47.

11. Professor Smyth told the Board that he envisages the University as a special kind of community whose central rationale should be the pursuit of truth. In his view, the University should exemplify the virtues of tolerance, trust, and truth, and develop more co-operative systems of organization and decision-making. Professor Smyth expressed concern about the intrusion of a trade union, which was viewed as an alien influence combining self-interest with a readiness to resort to industrial conflict to the potential prejudice of other members of the University community – especially the student body. The trade union, in his view, would institutionalize "adversarialism" rather than reconciliation. These views were all said to be a reflection of Professor Smyth's religious beliefs.

12. There is little doubt that Professor Smyth has sincere and deeply held convictions about York University, and the way it should operate. Moreover, he is in a unique position to articulate these views. After running a successful electrical business in the early 1950's, and serving as an administrator at the University of Toronto, he participated in the discussions leading to the founding of York University and the drafting of the first *York University Act* in 1959. He was on the Senate from 1963 to 1969, and he contributed to the redrafting of the *York University Act* of 1965. Indeed, the University, as an institution, is a matter of real academic interest to him. His Ph.D.

thesis involved an analysis of the structure of university government, and an examination of the historical and legal evolution of its internal governing bodies – particularly the changing relations between the Senate and the Board of Governors from the nineteenth century to the present. The depth of his knowledge and interest was evident from his evidence.

13. Professor Smyth was a member of the York University Staff Association, but he has always been firmly opposed to the organization and certification of Y.U.F.A. During the certification proceedings, Professor Smyth wrote a series of letters to the Board setting out his own position and endorsing that of counsel for Professor Jordan who also made representations to the Board in opposition to Y.U.F.A.'s certification. This series of letters is as follows:

4 February 1976

Gentlemen:

I write to you for two reasons. As a tenured faculty member of York University I am a party to the proceedings of your Board concerning the application of the York University Faculty Association. Thus my first reason for writing is to request that the Board kindly add me as a participating party to those proceedings and that the Board kindly hear me on 11 February 1976. My second reason for writing is to state that I have evidence which should be considered by your Board as it seeks to determine who constitute management and who are employees in York University.

Please let me explain at the outset why I did not request earlier that I be made a participating party. Since 1 September 1975 I have been on sabbatical leave from York and have spend [sic] considerable time traveling [sic] back and forth and in the United States on the research project for which I was granted leave. I have not received from your Board, or York Unviersity or the York University Faculty Association any communication nor have I seen any notice concerning your hearing of the latter's application. It was not until the first of this week that I saw the text of the form of agreement between York University Faculty Association and York Univesity signed by W. D. Farr on behalf of York University concerning the composition of the proposed "Faculty Bargaining Unit." The first of this week also I phoned your office and ask for a copy of your regulations to determine on what bases I could ask to be made a participating party to the proceedings. I spoke to Mr. Saxe, who told me that copies of the regulations were not available as they had not yet arrived from the printer. Later Mr. Brunskill kindly phoned and told me to write this letter.

Subsequently I learned of the regulation of your Board which permits you to decide at any time that a person may be declared to be a participating party to your proceedings. I earnestly believe that

on the basis of my intimate knowledge of, and day-by-day experience in, Canadian universities during more than twenty years and in particular in York University for nearly fourteen years I can help the Board in its consideration of the application submitted by the York University Faculty Association.

For seven years following a personal request from Bill Davis in 1966 I served as a member of the Ontario Council of Regents for Colleges of Applied Arts and Technology. During much of that time I was Vice-Chairman of the Council and for a period Acting Chairman. Thus I have some appreciation of the problems encountered by Boards such as yours when they seek to make their way carefully and thoughtfully through the thickets of uncertainty in post-secondary education in Ontario.

Perhaps I should note also that I have some expert knowledge of some of the unique legal aspects of universities which are not widely known but which should be appreciated in some detail by your board. If you grant my request I believe I should be able to contribute to the fund of knowledge concerning both the legal bases and the internal operations of universities which you will no doubt wish to have as you consider not only the application from the York Faculty Association but the applications from other Ontario university faculty associations which may well be coming to your Board for certification. There are subtle, but extremely important, differences in the separate legislative Acts which govern the affairs of Ontario universities. Hearing me concerning these matters could, I believe, expedite your consideration of the York application and other applications from Ontario universities which may be forthcoming.

Finally, let me assure you I earnestly wish to be helpful in your deliberations concerning York University in particular. York University was first established by an Act of the Ontario Legislature in 1959. I had my first contact in 1954 with some of those who later secured that Act. I contributed to the ideas and proposals which resulted in the passage of that Act. In 1962 I began to teach and serve as an administrator in York. I was appointed Dean of Atkinson College 1963 and served in that post until 1969. As you may know Atkinson College offers a wide variety of undergraduate degree programs for part-time and evening students who would not otherwise be enabled to proceed to university degrees. My concern as Dean of Atkinson and throughout my career as a university teacher and administrator has been to help 'the little guy', as the late Joseph E. Atkinson of The Star used to describe the common man. I know that your Board has the same concern.

I participated in the revision of the York Act, 1959. The draft document developed formed the basis for the York Act, 1965. More

important perhaps for your purposes I have gained an intimate knowledge both as a university teacher and as an administrator of how the university functions day-by-day. Since 1969 I have devoted myself to teaching and research in York University as a member of the faculty.

Please forgive me for the length of this letter but in view of the lateness of my request for a hearing I felt a rather comprehensive explanation should be provided. Since I did not receive notice from your Board, or from York University, or from the York University Faculty Association, and since I have not seen any notice concerning your hearing of the York Faculty Association application and due to the non-availability of printed copies of your regulations, I believe it is only fair in terms of natural justice to ask that you make me a participating party to your proceedings on the York University Faculty Association application and afford me a hearing on 11 February 1976.

Thank you for your consideration of this letter and the requests which it contains.

(emphasis added)

9 February 1976

Gentlemen:

In the hope that it may assist members of the Board in their consideration of the York University Faculty Association application I send four copies of each of the following Acts of the Ontario Legislature.

- An Act to Incorporate York University, 1959
- The York University Act, 1965.

You will note that Section 2 of the 1959 Act provides that certain persons named in that Section and "such other persons who may hereafter be appointed or elected Chancellor, President or a member of the Board or as a member of the Senate or upon whom the University may confer a degree are hereby created a body corporate with perpetual succession and a common seal under the name of "York University".

Section 2 of the York University Act, 1965 provides that "York University, its Board, Chancellor, President and Senate, and all other attributes thereof, are hereby continued and, subject to the provisions of this Act, have, hold, possess and enjoy respectively all

the rights, powers and privileges that they had at the time of the passing of this Act or that are conferred upon them by this Act.”

I trust drawing these Acts and their provisions to your attention will be of assistance as you consider who constitute management and who are employees in York University.

[From Counsel for Professor Jordan]

February 20th, 1976:

Dear Mr. Brunskill:

Re: York University Faculty Association
vs. York University et al.
Board File Number – 1394-75-R.

At the hearing before The Ontario Labour Relations Board on February 11th, 1976, I advised the Chairman of the Board panel that I would like to make further written submissions to the Board on the issues raised both at the hearing and in my letter dated February 9th, 1976. Given the importance of the matters raised, I would like to give the Board and the other parties some further clarification of the issues we have requested be dealt with.

The arguments and evidence which we wish to have dealt with relating to the appropriateness of the bargaining unit and the status of the applicant can be severed into two categories:

1) The appropriateness of the unit and the status of the applicant ought to be reviewed in light of the constitution of the university and in light of the de facto and de jure management responsibilities of, inter alia, the Board of Governors, the Senate and the Faculty.

2) The second and alternative submission is that the Board review its finding on status in light of what is alleged to be management participation in the formation of the applicant association.

1. The Appropriateness of the Bargaining Unit.

York University was established by the York University Act, S.O. 1959, Chapter 145. Section 2 of that Act established a body corporate composed of, inter alia, the Chancellor, President, Board of Governors and Senate of York University.

The York University Act of 1965, S.O. 1965, Chapter 143 when enacted repealed the earlier statute but by Section 2 of the

Act, York University and "all attributes thereof" continued to enjoy all the rights, powers and privileges in existence at the time of the Act together with those conferred by the Act.

It is important to note that the York University Act of 1965 (hereinafter called the 1965 Act) distinguishes between employees and teaching staff. Teaching staff is defined by Section 1(g) of the 1965 Act. The statute further distinguishes between employees and teaching staff (Section 3, Section 10(c), Section 13(2)(d) and Section 15).

The distinction in the 1965 Act between employees and teaching staff it is submitted, means that an organization of faculty members cannot be an organization of employees within the meaning of section 1(1)(n) [now section 1(1)(p)] of The Labour Relations Act. The distinction between employees and teaching staff is not merely fortuitous but reflects both the constitution of the University as designed by statute and the commitments [sic] and practices of the University which when scrutinized reflect real managerial responsibilities exercised by appointed faculty members.

The comingling [sic] of teaching and managerial activities is not confined to Deans, Associate Deans or others whom the applicant agrees should be excluded from any bargaining unit. Indeed, the comingling [sic] of such activities in individual faculty members is characteristic of the collegial administration of the affairs [sic] of York University, because of the 1965 Act as well as the established commitments [sic] and practices of the University. We propose that the conflict of interest found by the Board in the case of *Hydro-Electric Power Commission of Ontario, O.L.R.B., M.R.*, August 1971 at page 504 exists in the proposed application not only because specific managerial personnel have been active in Y.U.F.A. but also because the individual faculty members in Y.U.F.A. are managerial.

Section 11 of the 1965 Act establishes a Senate composed of a number of specified persons together with the full time teaching staff who always constitute a majority of the members of the Senate (Section 11).

The management of the University in general terms is given to the Board of Governors, except as to matters specifically assigned to the Senate (Section 10). Specific managerial functions then are given to the Senate. Section 12 of the 1965 Act makes the Senate responsible for:

- the academic policy of the University (including those matters specifically referred to in subsections (b) to (f) inclusive, such as student admission, curricula, graduation requirements, and the award of fellowships)

- recommending to the Board establishing new faculties, schools, etc.
- establishing faculty councils.

If we were to analogize with an industrial situation, the academic policies of a University determine its “product line”, those who are allowed to purchase those “products”, and the production units.

The President is, by Section 13 of the 1965 Act, given certain authority. Again the role of the Senate is critical:

- the President is appointed by the Board after consultation with the Senate. Evidence will show that the Senate proposes a short list of candidates from among whom the Board must choose. Similarly, the President and Board must appoint Deans from a short list of candidates approved by faculty.
- the President by Section 13(1)(b) is authorized to direct the implementation of educational policy (determined by the Senate and the faculty)
- the President by Section 13(1)(d) can recommend appointment, promotion, and removal of teaching staff. In this regard, the President in making these recommendations to this Board is governed by the “terms of the University’s commitments and practices” (See section 10(c)). Evidence will show that the commitments and practices of the University involve the faculty and the Senate in these [sic] managerial decisions.

Also of importance are the following provisions of the 1965 Act.

- Section 10(k) - establishing of faculties is done with the concurrence of Senate
- Section 13(e) - the President can recommend to the Senate the establishment of new faculties, etc.
- Section 13(g) - the President can recommend to the Senate regulations governing the faculties
- Section 13(h) - the President has powers to establish Committees (which are often composed of faculty members) to recommend action on matters affecting the University
- Section 14 - the Senate consults with the Board with respect to the appointment of a Chancellor

We are prepared to adduce evidence that the commitments and practices concerning appointing, promoting and removing of teaching staff in the University results in this fundamental managerial responsibility being discharged by the teaching staff in a collegial manner. In the important areas of tenure and promotion the faculty participates fully both through faculty and departmental committees and the Senate and its Committee on Tenure and Promotion.

The Senate has established committees to assist it in the exercise of its responsibilities. These committees become thoroughly involved in the exercise of managerial functions. It is submitted The Ontario Labour Relations Board ought to hear evidence on the functioning of such committees (composed of faculty members) as:

- Academic Policy and Planning Committee
- Executive Committee
- Library Committee
- Committee on Research
- Committee on Scholarship and Student Assistance
- Committee on Tenure and Promotion
- Committee on the Organization and Structure of the University
- Committee on Academic Dismissal
- Committee on Bookstore
- Committee on York University Publications
- Committee on Budget
- Committee on Part-Time Faculty

Evidence of the managerial responsibilities of these committees, it is submitted, should be put before The Ontario Labour Relations Board in direct evidence.

As mentioned above, the Senate may create councils in faculties by Section 12 of the 1965 Act. Such councils in fact have been established. These faculty councils too participate directly in the management and administration of the University and warrant specific attention. Involvement in the actual allocation of research funds, hiring, tenure, promotion, dismissal, work load allocation and other important managerial functions underlines managerial

functions underlines further the involvement of the faculty in the management of the University.

In conclusion, we submit that it is of vital importance for the University and this tribunal, that the matters raised above be thoroughly viewed by The Ontario Labour Relations Board by hearing evidence and argument. We submit that an investigation of the above matters will reveal that the collegial system of governance by the teaching staff pervades every level of management of the University.

We have enclosed for the Board a copy of *The Senate Handbook* of York University (July 1, 1975 edition). This contains a description of the terms of reference of Committees of the Senate (page 55 ff).

2. *The Status of the Applicant.*

An alternative submission, if the Board rejects the above argument, is that the Board should review its findings of status. We repeat the position taken in our letter of February 9th, 1976. As indicated at the hearing, we are prepared to call evidence in support of the allegations that Dean Beachy remained active in Y.U.F.A. after March 18th, 1975; that Deans and Associate Deans contributed financially to Y.U.F.A. after the amendments to Y.U.F.A.'s constitution in March, 1975; that a significant number of members of Y.U.F.A. sought to be included in the unit are management by virtue of membership in the Senate or on its Committees.

Based on the above, and the submissions contained in our letter of February 9th, 1976, we request the Board to reconsider its decision dated January 26th, 1976 wherein the Board found Y.U.F.A. to be a trade union within the meaning of the *Labour Relations Act*.

The final matter raised in our letter of February 9th, 1976 related to the exclusion of certain persons from the bargaining unit. If our positions in 1 and 2 above do not succeed, we repeat this request.

All of which is respectfully submitted.

[From Professor Smyth]

28 February 1976

Gentlemen:

Thank you for your letter of 23 February 1976. In connection with the letter of 20 February 1976, from the solicitor for Professor

Jordan, a copy of which you kindly enclosed I make the following comments.

1. I agree fully that the Board should receive evidence and consider arguments concerning the issues raised in the letter dated 20 February 1976 from Mr. John Murray of Havrlant Robinson Gray Murray Bateman Saul.
2. The letter of 20 February 1976 from Mr. Murray did not note with adequate emphasis the fiduciary status and responsibilities of faculty members in York University as established by the York University Acts 1959 and 1965. By virtue of the provisions of these Acts full-time faculty members at York, who by statute always constitute a majority of the members of the Senate, are legally authorized to share in the management of York University.
3. As a result of nearly fourteen years as a faculty member and administrator at York University I confirm that:
 - (a) The faculty of York University collectively through their role as members of academic departments, through their membership in faculty councils which have been created by and function as committees of the Senate and through their elected representatives in the Senate constitute the management group at York University which makes the following management decisions:
 - Who will teach and who will be members of organized research units at York
 - Which faculty members will be or will not be promoted
 - What will be taught in York University
 - Who will and who will not be granted earned academic degrees in York University
 - How approximately 70% or more of the budget of York University will be allocated
 - (b) Faculty members at York University are *not* directed in the manner in which they do their work; they participate individually and collectively in the appointment and termination of the appointment of faculty members.

- (c) Most if not all faculty members participate directly or indirectly in the planning, organizing, staffing, co-ordinating, reporting and budget allocation functions of York University. All of these are management functions.
- (d) At York University administrators are servants not managers unless they are faculty members. It is their role, of faculty members which makes them managers. If an administrator at York University is not a faculty member he is an employee. In this York's arrangements are in the British not the United States tradition. York faculty members share by law and by practice in management functions.

In conclusion let me stress again the fiduciary responsibilities of faculty members at York University by virtue of the statutory role and operation of the York Senate, which is the only body in York empowered to establish policy. It functions as the chief policy making body of York University. Faculty members manage the implementation of that policy.

I trust these comments are helpful.

14. These letters were put to Professor Smyth during his cross-examination in the present proceeding, and he indicated that he still stands by their contents. He subsequently wrote, but did not send, a further letter dated July 222, 1976 responding to certain observations made by the Board in its decision of April 6, 1976. In this letter he repeats that it was his desire to assist the Board by explaining the special status of York University as a body corporate under its governing legislation which, in his view, was substantially different from the governing legislation of other universities. He was not, he said, seeking to oppose the issuance of a Board certificate, but rather seeking to explain why, as a matter of law, the *Labour Relations Act* could not be applied to York.

15. A reading of the letter of February 4, 1976 leaves one with the impression, initially at least, that Professor Smyth was out of the country and unaware of the certification proceedings before the Board. But this impression is quite wrong. In October 1975, in the midst of the union's organizing campaign, Professor Smyth wrote an article in the York Gazette subtitled "Some Observations on the Essential Debate on Faculty Unionization and the Implications of [sic] York's Future". That article, which was filed with the Board, indicates that he was well aware of the organizing campaign going on around him. Moreover, the application for certification itself was filed by Y.U.F.A. on December 5, 1975, and notices to employees were subsequently posted on the York premises. These notices in Form 5 (now Form 6) set out the date, time and place of the Board's hearing and advised employees that any statement in opposition to certification must be filled by the named terminal date, and that employees or their representatives must be prepared to appear at the hearing to speak to the issues. In response to these notices the Board received a document dated December 10, 1975, which reads:

TO: THE ONTARIO LABOUR RELATIONS BOARD

File No. 1394-75-R

IN THE MATTER OF AN APPLICATION BETWEEN:

YORK UNIVERSITY FACULTY ASSOCIATION.

Applicant

- and -

YORK UNIVERSITY

Respondent

STATEMENT OF DESIRE

We, the undersigned employees of York University, hereby respectfully advise this Board that we do not wish *to be represented by the applicant herein as our bargaining agent* with our employer, the respondent herein.

We also hereby authorize and appoint James Goodale, C. Hammond Dugan, Douglas Butler, James S. Tait, Paul Herzberg and John Yolton, our fellow employees to be our representatives before this board and to speak on our behalf on all matters relating to this application.

The mailing address for our representatives is c/o Dr. D. Butler, Faculty of Chemistry, York University, 4700 Keele Street, Downsview, Ontario, and the name of our solicitor is Benjamin Lamb, Q.C., Messrs. Dillion, Cronin & Lamb, Suite 1002, 111 Richmond Street West, Toronto, Ontario.

DATED this 10th day of December, 1975.

NAME (Printed)

SIGNATURE

WITNESS

Professor Smyth's name appears on this document and counsel did appear at the hearing on behalf of the named employee objectors. In addition, Professor Smyth does not deny that he himself was actually in the hearing room when the case came on before the Board on December 22, 1975. Thus, to the extent that Professor Smyth's initial letter to the Board (dated February 4, 1976) creates the impression that he was out of the country and unaware of the Board's proceeding it is obviously (and in the union's submission intentionally) misleading.

16. The union seeks to rely on these letters and documents for two reasons. Firstly, it asserts that they cast doubt on the applicant's veracity in the instant case. The union argues that, having misled the Board before when a lack of notice would have

supported his case, the Board should be wary of accepting his evidence of professed religious belief now that that is the element he must demonstrate. Secondly, the union argues that this series of letters reveals the “real reason” for Professor Smyth’s opposition to the union – opposition which, in the union’s submission, is grounded on his analysis of the legal framework governing York University (which Professor Smyth helped draft), and has nothing to do with his religion.

17. There is support for both propositions in the replies given by Professor Smyth on cross-examination; and regrettably, we are constrained to note that we did not find some of those replies as candid or forthright as they might have been.

18. Professor Smyth testified, somewhat surprisingly, that “no reasonable person could construe his activities as being opposed to the union”. He was, he said, simply seeking to establish the truth. With respect, it is difficult to construe his signature on the anti-certification petition any other way; nor, if he were not really opposed to the union is it easy to understand his close association with an informal organization of Professors known as the Independent Faculty Movement (I.F.M.) which also sought to oppose Y.U.F.A.’s application. Professor Smyth’s name appears on a number of I.F.M. pamphlets (including one with a piece entitled “HOW to Stop Unionization”) as an individual who can be contacted for further information. In the circumstances, it is a little difficult to understand Professor Smyth’s assertion that he was not opposed to the union and that no reasonable person could construe his activities in this way. It is also a little difficult to reconcile his evidence that adherents to the Quaker belief do not proselytize (advanced in response to counsels question about whether he solicited support for the anti-union petition) with his name appearing on I.F.M. literature and his appearance in debate on the pros and cons of trade unionism held at Lakehead University.

19. Professor Smyth’s concern with the trade union did not end with its certification. He supported a subsequent application for judicial review, and was disappointed because, in his view, employee counsel (John Sopinka, Q.C.) had not adequately advanced his argument. On May 1, 1978, he co-signed a letter to the Board of Governors to which was attached a petition signed by some 277 Faculty members opposing compulsory trade union membership or dues payments as a matter of principle and in defence of academic freedom. When asked why this material did not raise religious concerns, Professor Smyth replied that “the Lord advises us to be wise as serpents and [appear] harmless as doves” – by which he meant that it was expedient to frame the submission in a manner which would be most likely to appeal to the constituency. A similar explanation was advanced in respect of the I.F.M. pamphlets which, according to Professor Smyth, contained a number of arguments with which he did not agree but to which he did not object. Once again, to put it colloquially, Professor Smyth was content to see the argument framed in a manner which would “sell” even though he said, he did not personally accept all of the arguments advanced over his name. Professor Smyth repeated the same biblical injunction in response to counsel’s enquiry about the delay in filing the instant application. If supporting the union was so deeply offensive, counsel asked, why did Professor Smyth not seek exemption in a more timely fashion but, rather waited until the first and leading case (*Butler*) had already been decided. The *Butler* decision issued on September 28, 1981, and it was not until February 26, 1982 that the instant application was filed.

20. However apt the biblical quotation may be, we find it vaguely troubling in the context of a proceeding in which the Board must determine whether an individual's opposition to a trade union is because of his religious beliefs or, alternatively, whether religion is simply being advanced because it is necessary to do so in order to succeed under section 47. The union contends that, as before, the applicant is simply telling the Board what it has to hear. We also note Professor Smyth's admission that he discussed with others the applications they intended to make under section 47, and attended at least one hearing where the applicant gave his/her evidence, and was questioned in much the same way as Professor Smyth himself subsequently was. The respondent asserts that this too must be considered in assessing his credibility.

21. Professor Smyth was rigorously cross-examined on his views respecting trade unions – especially after his initial assertion that he was not really opposed to the Y.U.F.A. organizing campaign at all. Over the course of this cross-examination (at different points and in response to different questions), counsel elicited a series of responses which were both consistent with each other, and with the rationale for opposing the union set out in Professor Smyth's various letters to the Board.

22. In Professor Smyth's view, the faculty cannot be "employees" within the meaning of the Act, because through their participation on the various bodies established for the University's governance, they are properly regarded as "academic managers" rather than employees of the University. Professor Smyth was not opposed to the Y.U.F.A. he said, he only wanted York to operate "in accordance with its constitution" – which, as he saw it, was inconsistent with the existence of a trade union. He was opposed to the union, he finally conceded, "in the actual legal context of York University". He testified that he was not proselytizing on behalf of a cause, he simply wanted the "rule of law" to prevail. He wanted the University to "act in accordance with the York University Act", and to "live up to its charter". He said that the union was not only unnecessary, but he was opposed to it given the York constitution and the *York University Act* of 1965. Indeed, in his view, even if the union renounced the use of the strike weapon (to which he was opposed) and opted for arbitration, he told the Board he would still be opposed because the *York University Act*, as he reads it, excludes the possibility of trade unionism. And, it will be recalled that Professor Smyth is something of an expert on university government and had a hand in developing the legal framework for York University. Professor Smyth told the Board that the charter for Carleton University is quite different. There, the Faculty are clearly employees, whereas at York they have a different and superior status within the Institution.

23. Professor Smyth initially testified about his objection to certain statements in the Y.U.F.A. leaflets, which he referred to as an illustration of the features of a trade union which he disliked. He admitted on cross-examination, however, that it really didn't matter what was in the pamphlets or what position the union took. His point was that "as academic managers" of the University, the faculty could not have a union at all. They could not, in effect, bargain with themselves. Nor was he opposed to compulsion at York in respect of such unilaterally imposed employee deductions as pension plan payments or other global employee plans which restricted the right to opt out. In this context Professor Smyth saw no room for dissent. Employees who did not like the arrangement could work elsewhere.

24. These submissions essentially repeat those which Professor Smyth made to the Board in 1976, and which were made on Professor Jordan's behalf by J. C. Murray, who was then his counsel. They reflect a legal analysis grounded in the relationship between the *York University Act* and the *Labour Relations Act*; and, it must be admitted, that (apart altogether from the particular wording of the York statute) the University is a unique institution with collegial forms of decision-making which are very different from those prevalent in private industry. Indeed, the notion that the Faculty are the "academic managers" of the University was developed and debated before the Supreme Court of the United States in *N.L.R.B. v. Yeshiva University*, (1980) 103 L.R.R.M. 2526. But however cogent this legal analysis may be, and however deeply this view is held, it is not a "religious conviction or belief" within the intended meaning of section 47 of the Act.

25. Despite certain concerns which we have already expressed, we have no doubt that Professor Smyth holds views which are unquestionably religious and that he holds those views sincerely. On the basis of the totality of the evidence before us, however, we reject his contention that it is those religious beliefs which prompt his opposition to the trade union. On the contrary we find that his opposition is based upon the legal analysis or argument to which we have already referred and which is grounded upon an interpretation of the *York University Act* (which, as noted, he had a hand in drafting). Further, we do not find that this legal analysis or question of statutory interpretation is grounded on Professor Smyth's religious convictions, despite the religious gloss which he now seeks to give it. No doubt Professor Smyth sincerely believes that trade unionism is inconsistent with the charter and constitution of York University. However, in our view, this belief is not a religious conviction, does not, in his case, stem from a religious conviction, and does not fall within the ambit of section 47 of the Act.

26. The application is therefore dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD OCTOBER 1982

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1447-80-R: United Steelworkers of America, (Applicant) v. Baltimore Aircoil Interamerican Corporation, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Halton Hills, save and except forepersons, persons above the rank of foreperson, office and sales staff and students employed during the school vacation period." (54 employees in unit). (*De novo Hearing*).

1412-81-R: Retail Clerks Union, Local 409, (Applicant) v. Phillips Security Agency Inc., (Respondent).

Unit: "all employees of the respondent employed in the City of Thunder Bay, other than those employed as guards protecting the property of employers, save and except supervisors, persons above the rank of supervisor and office staff." (54 employees in unit).

0833-82-R: Sheet Metal Workers' International Association Local Union 504, (Applicant) v. J. McLeod & Sons Ltd., (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0851-82-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. Royal Canadian Legion, Branch #9, (Respondent).

Unit: "all employees of the respondent at Royal Canadian Legion Branch #9 in Kingston, Ontario, save and except manager, office and sales staff." (28 employees in unit).

1045-82-R: Ontario Public Service Employees Union, (Applicant) v. Deep River and District Hospital, (Respondent).

Unit: "all paramedical employees of the respondent at Deep River, Ontario, save and except Chief Laboratory Technologist, Charge Radiology Technologist, Head of Physiotherapy, Director of Medical Records, those above such rank, and physicians." (6 employees in unit). (*Having regard to the agreement of the parties*).

1050-82-R: Local Union 636 of the International Brotherhood of Electrical Workers, (Applicant) v. Seaforth Public Utility Commission, (Respondent).

Unit: "all employees of the respondent at Seaforth, Ontario save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (4 employees in unit).

1054-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. Wickford Holdings Limited, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 188 Mill Street South, Brampton, Ontario including resident superintendents, save and except property manager, office and clerical staff, and students employed during the school vacation period." (2 employees in unit).

1061-82-R: General Workers Union, Local 1030 of the U.B.C. and J. of A., (Applicant) v. F. LeBlond Cement Products Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Ottawa, Ontario, engaged in the manufacture of pre-cast concrete products, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (5 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1092-82-R: Ontario Nurses' Association, (Applicant) v. Canadian Red Cross Society Ontario Division – Red Cross Hospital, (Respondent).

Unit: "all registered and graduate nurses regularly employed by the respondent in a nursing capacity for not more than 24 hours per week at Burk's Falls, Ontario, save and except the nurse administrator and persons above the rank of nurse administrator." (5 employees in unit). (*Having regard to the agreement of the parties*).

1137-82-R: Ontario Public Service Employees Union, (Applicant) v. West Nipissing General Hospital, (Respondent) v. Employee, (Objector).

Unit: "all paramedical employees of the West Nipissing General Hospital at Sturgeon Falls, Ontario, save and except professional medical staff, charge laboratory technologist, charge radiology technologist, Director of Food Services, Director of Medical Records, Director of Physiotherapy, Director of Pharmacy and persons above such rank, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreement." (10 employees in unit).

1140-82-R: Hotels, Clubs, Restaurants and Tavern Employees' Union, Local 261, (Applicant) v. Modern Building Cleaning, a Division of Dusbane Enterprises Limited, (Respondent).

Unit: "all employees of the respondent at the Transport Canada Training Institute, Cornwall, Ontario, save and except foremen, foreladies, persons above the rank of foreman, forelady, office, clerical and sales staff." (79 employees in unit). (*Having regard to the agreement of the parties*).

1165-82-R: Ontario Public Service Employees Union, (Applicant) v. Industrial Resource Centre, (Windsor/Essex) Inc., (Respondent).

Unit: "all office and clerical employees of the respondent at Windsor, Ontario, save and except the secretary to the general manager and persons above the rank of secretary to the general manager." (2 employees in unit). (*Clarity Note*).

1167-82-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Acme Uniform Limited, (Respondent).

Unit: "all employees of the respondent in Burlington, save and except foremen, foreladies, persons above the rank of foreman and forelady, clerical and sales staff, students employed for the school vacation period, and persons regularly employed for not more than twenty-four hours per week." (7 employees in unit).

1170-82-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Prazmowski Construction Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1171-82-R: Canadian Union of Public Employees, (Applicant) v. De Kap Management Limited, (Respondent).

Unit: "all office and clerical employees of the respondent at Kapuskasing, Ontario save and except Assistant-Manager, persons above the rank of Assistant-Manager and students employed during the school vacation period." (11 employees in unit). (*Having regard to the agreement of the parties*).

1173-82-R: United Brotherhood of Carpenters & Joiners of America, Local 3189, (Applicant) v. J. M. W. Holdings Limited carrying on business as Ultracraft Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed at its plant in Elora, Ontario, save and except foremen, office and sales staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

1177-82-R: United Food & Commercial Workers International Union affiliated with the Canadian Labour Congress, AFL-CIO, (Applicant) v. Dresden Industrial Company, (Respondent).

Unit: "all employees of the respondent at Dresden, save and except foremen, persons above the rank of foreman, office staff and outside sales staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

1180-82-R: Service Employees International Union, Local 268, (Applicant) v. Canadian Red Cross Society, Ontario Division, Thessalon Red Cross Hospital, (Respondent).

Unit: "all employees of the respondent at its hospital in Thessalon, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period save and except professional medical staff, registered graduate and undergraduate nurses, office and clerical staff, supervisors and persons above the rank of office and clerical staff, supervisors and persons above the rank of supervisor." (11 employees in unit). (*Having regard to the agreement of the parties*).

1181-82-R: Service Employees International Union, Local 268, (Applicant) v. Canadian Red Cross Society, Ontario Division, Thessalon Red Cross Hospital, (Respondent).

Unit: "all employees of the respondent at its hospital in Thessalon, Ontario, save and except professional medical staff, registered graduate and undergraduate nurses, office and clerical staff, supervisors and persons above the rank of supervisor, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (19 employees in unit). (*Having regard to the agreement of the parties*).

1183-82-R: International Union of Operating Engineers, Local 796, (Applicant) v. Bay Street Atria Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

1184-82-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Chateau Gardens (Hanover) Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Hanover regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff." (33 employees in unit). (*Having regard to the agreement of the parties*).

1189-82-R: Labourers' International Union of North America, Local 1509, (Applicant) v. Walter Ostojic Masonry, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

1195-82-R: The Public Service Alliance of Canada, (Applicant) v. Cameron Security Services, a division of Douglas N. Cameron Construction Limited, (Respondent).

Unit: "all employees of the respondent in its security services division at Moose Factory Hospital, Moose Factory, Ontario save and except the manager, persons above the rank of manager and employees covered by the Ontario Labour Relations Board certificate issued on March 24, 1982." (9 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1196-82-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. Crestwood Foods Ltd., (Respondent).

Unit: "all employees of the respondent employed in Woodstock, Ontario, save and except supervisors, persons above the rank of supervisor, office, sales and quality control staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).

1199-82-R: Service Employees Union, Local 205 Affiliated with A.F.L., C.I.O., C.L.C., (Applicant) v. The Runnymede Hospital, (Respondent).

Unit: "all registered and graduate nurses engaged in a nursing capacity regularly employed by the respondent in Metropolitan Toronto for not more than twenty-four hours per week save and except assistant head nurses, supervisors and persons above the rank of assistant head nurse and persons covered by subsisting collective agreements." (18 employees in unit). (*Having regard to the agreement of the parties*).

1200-82-R: Service Employees Union, Local 204 Affiliated with A.F.L., C.I.O., C.L.C., (Applicant) v. Daheim Nursing Home Limited, (Respondent).

Unit: "all registered nurses, graduate nurses and undergraduate nurses employed by the respondent in Uxbridge, Ontario for not more than twenty-four hours per week, save and except head nurse, supervisors and persons above the rank of supervisor or head nurse." (6 employees in unit). (*Having regard to the agreement of the parties*).

1201-82-R: Canadian Union of Public Employees, (Applicant) v. Crothall Services Limited, (Respondent).

Unit #1: "all employees of the respondent in the City of Kingston save and except manager, those above the rank of manager, and persons regularly employed for not more than twenty-four hours per week." (8 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week in the City of Kingston, save and except manager and those above the rank of manager." (5 employees in unit). (*Having regard to the agreement of the parties*).

1201-82-R: Canadian Union of Public Employees, (Applicant) v. The Public Utilities Commission of the Town of Picton, (Respondent).

Unit: "all employees of the respondent working in the Town of Picton and the County of Prince Edward, save and except the manager, assistant manager, persons above the rank of assistant manager, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and those persons covered by a subsisting collective agreement." (14 employees in unit). (*Having regard to the agreement of the parties*).

1205-82-R: International Brotherhood of Painters and Allied Trades Local 1891, (Applicant) v. Richway Construction Ltd., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1210-82-R: Christian Labour Association of Canada, (Applicant) v. Inter-County Concrete Products Ltd., (Respondent).

Unit: "all employees of the respondent working at Dunnville, Ontario, save and except foremen, batcher-dispatcher, and those above the rank of foreman and batcher-dispatcher, office, sales

and technical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (7 employees in unit). (*Having regard to the agreement of the parties*).

1219-82-R: International Union of Operating Engineers, Local 793, v. Quebec Crane Ltd., (Respondent).

Unit #1: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1223-82-R: Ontario Nurses’ Association, (Applicant) v. Canadian Red Cross Society, Ontario Division Thessalon Red Cross Hospital, (Respondent).

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent, save and except the nurse administrator and persons above the rank of nurse administrator, persons regularly employed for not more than twenty-four hours per week and all other persons covered by subsisting collective agreements.” (7 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent regularly employed for not more than twenty-four hours per week save and except the nurse administrator and persons above the rank of nurse administrator and all other persons covered by subsisting collective agreements.” (7 employees in unit). (*Having regard to the agreement of the parties*).

1241-82-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. N. Tepperman Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (24 employees in unit). (*Having regard to the agreement of the parties*).

1249-82-R: Labourers’ International Union of North America, Local 1036, (Applicant) v. Lilley Resources Limited, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit). (*Having regard to the agreement of the parties*).

1269-82-R: Hotels, Clubs, Restaurants, Tavern Employees' Union Local 261, (Applicant) v. Team Model & Pattern Co., (Applicant) v. VS Services Ltd., (Respondent).

Unit: "all employees of the respondent at St. Lawrence College, Kingston, Ontario, save and except supervisors, head cook, persons above the rank of head cook and students employed during the school vacation period." (12 employees in unit). (*Having regard to the agreement of the parties*).

1272-82-R: Pattern Makers League of North America, (Applicant) v. Team Model & Pattern Co., (Respondent).

Unit: "all pattern makers and apprentices in the employ of the respondent in the City of Windsor, save and except foremen and persons above the rank of foreman." (3 employees in unit). (*Having regard to the agreement of the parties*).

1288-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. Peel Condominium Corporation #112, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 20 and 50 Mississauga Valley Blvd., Mississauga, Ontario, including resident superintendents, save and except property manager, office and clerical staff." (5 employees in unit).

1289-82-R: Service Employees Union, Local 204 Affiliated with A.F.L., C.I.O., C.L.C., (Applicant) v. Modern Building Cleaning, a Division of Dustbane Enterprises Limited, (Respondent).

Unit: "all employees of the respondent at the Runnymede Hospital in Metropolitan Toronto, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

1290-82-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Board of Governors of the University of Western Ontario, (Respondent).

Unit: "all stationary engineers and persons engaged primarily as their helpers employed by the respondent in the main heating plant and the outdoor skating rink of the respondent at London, Ontario, save and except the chief engineer." (10 employees in unit). (*Having regard to the agreement of the parties*).

1291-82-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Corporation of the Town of Durham, (Respondent).

Unit: "all employees of the respondent in the County of Grey, save and except the arena manager and superintendent, persons above the rank of arena manager and superintendent, persons covered by subsisting collective agreements, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period. (19 employees in unit). (*Having regard to the agreement of the parties*).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1010-82-R: Ontario Public Service Employees Union, (Applicant) v. Modern Building Cleaning, a Division of Dustbane Enterprises Limited, (Respondent) v. The Canadian Union of Operating Engineers and General Workers, (Intervener).

Unit: "all employees of the respondent at the Ontario Science Centre, Toronto, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (21 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		19
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		16
Number of ballots marked in favour of intervener		2

1011-82-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Stedman's, Division of Macleod-Stedman Inc., (Respondent) v. Stedman's Employee Association, (Intervener).

Unit: "all employees of the respondent at its warehouse operation at 7622 Keele Street, Concord, Ontario save and except supervisors, persons above the rank of supervisor, buyers, assistant buyers, printers and office, cafeteria and security staff." (113 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		113
Number of persons who cast ballots	112	
Number of ballots marked in favour of applicant		80
Number of ballots marked in favour of intervener		32

1182-82-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853, (Applicant) v. Vipond Automatic Sprinkler Company Limited, (Respondent) v. United Electrical, Radio and Machine Workers of America (UE), (Intervener).

Unit: "all employees of the respondent on Vipond Drive, Mississauga, save and except foremen, persons above the rank of foreman, outside installation workers, office and sales staff and students employed during the school vacation period." (24 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		23
Number of persons who case ballots	21	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		19
Number of ballots marked in favour of intervener		1

Applications for Certification Dismissed – No Vote Conducted

0766-82-R: Hotel, Restaurant and Cafeteria Employee Union, Local 75, (Applicant) v. Panache Rotisseurs Inc., operating under the name and style of St. Hubert Bar-B-Q, (Respondent). (61 employees in unit).

1133-82-R: Energy and Chemical Workers Union, (Applicant) v. Brown Fintube Engineering, (Respondent). (36 employees in unit).

1209-82-R: Ontario Public Service Employees Union, (Applicant) v. The Toronto General Hospital, (Respondent). (277 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0021-82-R: United Steelworkers of America, (Applicant) v. Mobile Materials Handling Equipment Limited, (Respondent).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (33 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		43
Number of persons who cast ballots	37	
Number of ballots marked in favour of applicant		18
Number of ballots marked against applicant		19

1032-82-R: Canadian Paperworkers Union, (Applicant) v. Domtar Inc., (Respondent) v. Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all employees of the respondent in its Domtar Forest Products, Woodlands Division, Nipigon, Ontario who are engaged in Woods Operations on the limits and on the work sites of the respondent." (268 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		268
Number of persons who case ballots	185	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		19
Number of ballots marked in favour of intervener		165

1079-82-R: Ontario Public Service Employees Union, (Applicant) v. Mount Sinai Hospital, (Respondent).

Unit: "all paramedical employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, students in training, interns, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements." (204 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared		171
Number of persons who case ballots	143	
Number of ballots marked in favour of applicant		54
Number of ballots marked against applicant		86
Ballots segregated and not counted		3

Applications for Certification Dismissed Subsequent to a Post Hearing Vote

0666-82-R: International Association of Machinists & Aerospace Workers, (Applicant) v. Airgo Agency Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen and persons above the rank of foreman, office and sales staff." (16 employees in unit).

Number of names of persons on list as originally prepared		16
Number of persons who case ballots	16	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		13

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0209-82-R: Hubert Liedtke, (Applicant) v. Local 47 Sheet Metal Workers' International Association, (Respondent) v. Irvcon Roofing & Sheet Metal (Pembroke) Ltd., (Intervener).

0378-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. Voyageur Marine Construction, (Respondent) v. Electrical Power Systems Construction Association, (Intervener).

0420-82-R: Labourers International Union of North America, Local 183, (Applicant) v. Karvon Construction Limited, (Respondent).

1025-82-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. Richmond Roofing Limited, (Respondent).

1113-82-R: Hotels, Clubs, Restaurants, & Tavern Employee's Union Local 261 Ottawa, Ontario, (Applicant) v. V.S. Vending Services Ltd., (Respondent).

1130-82-R: United Textile Workers of America, (Applicant) v. Warren Knit, (Respondent).

1139-82-R: Laborers' International Union of North America, Local 607, (Applicant) v. Rock Excavating (Sudbury) Ltd., (Respondent).

1141-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. The Corporation of the Town of Walkerton, (Respondent).

1152-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. Rok Engineering Construction, (Respondent).

1157-82-R: The Ontario Provincial Conference of Bricklayers and Allied Craftsmen, (Applicant) v. D & S Masonry, (Respondent) v. Group of Employees, (Objectors).

1190-82-R: Canadian Union of Public Employees, (Applicant) v. Regional Municipality of Hamilton-Wentworth (Heritage House), (Respondent) v. Employee, (Objector).

1251-82-R: L'Association Des Professeurs D'Universite De Hearst, (Applicant) v. Le College De Hearst, (Respondent).

1283-82-R: Hotel's, Clubs, Restaurants, and Tavern Employees' Union Local 261 Ottawa, Ontario, (Applicant) v. Versa Foods, (Respondent).

1359-82-R: International Ladies Garment Workers' Union, (Applicant) v. Petite Originals Company Limited, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1000-82-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant v. Begg & Daigle Limited; Tritor Developments Limited; and Begg & Daigle Store and Office Interiors Ltd., (Respondents). (*Granted*).

1258-82-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Steve Devecseri, in his personal capacity; Steve Devecseri General Carpentry Contracting; and, Steve Devecseri Construction Ltd., (Respondents). (*Withdrawn*).

SALE OF A BUSINESS

0999-82-R: Commercial Workers' Union Local 486, (Applicant) v. Miracle Mart Ltd. and Genesco of Canada Co., Ltd., (Respondent) v. Massicotte, Sullivan & Ass. (Mr. A. Bilodeau) (on behalf of Miracle Mart), (Intervener). (*Withdrawn*).

1001-82-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Begg & Daigle Limited; Tritor Developments Limited; and Begg & Daigle Store and Office Interiors Ltd., (Respondents). (*Granted*).

1135-82-R: The Toronto Motion Picture Projectionists' Union, Local 173, of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, (Applicant) v. 365414 Ontario Ltd., carrying on business as The Coronet Theatre, and Hugo Albel, personally, and Canada Factors Limited, (Respondent). (*Withdrawn*).

1259-82-R: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Steve Devecseri, in his personal capacity; Steven Devecseri General Carpentry Contracting; and, Steve Devecseri Construction Limited, (Respondents). (*Withdrawn*).

UNION SUCCESSOR RIGHTS

1091-82-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2658-81-R: Ron McKibbin, and others, (Applicants) v. United Brotherhood of Carpenters and Joiners of America, (Respondent) v. Clarence H. Graham Construction Limited, (Intervener). Unit: "all carpenters and carpenters' apprentices in the employ of Clarence H. Graham Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (*Granted*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who case ballots	3	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list		1
Number of segregated ballots cast by persons whose names appear on voters' list		2

0486-82-R: W. Thomas Arnold, (Applicant) v. Retail Commercial and Industrial Union, Local 206 Chartered by the United Food and Commercial Worker International, (Respondent) v. Comstock Funeral Home Ltd., (Intervener). (*Dismissed*).

0909-82-R: William Hemminger, Jim Mohr, Vaughn Munroe, Dave Portsmouth, John Cuddahee, (Applicants), v. International Woodworkers of America, (Respondent) v. Ready Wood Products Ltd., (Intervener).

Unit: "all employees of the respondent at Lindsay, Ontario save and except foreman, persons above the rank of foreman, office and sales staff, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (*Granted*).

Number of names of persons on list as originally prepared		5
Number of persons who case ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

0944-82-R: Lawrence Alexander, (Applicant) v. United Food and Commercial Workers International Union, Local 1000A, (Respondent) v. Consumers Distributing Company Limited, (Intervener). (*Granted*).

0983-82-R: Angela Lopardo, (Applicant) v. The International Ladies' Garment Workers' Union, (Respondent) v. The Sigal Shirt Company Limited, (Intervener). (*Dismissed*).

1026-82-R: Pat O'Shea and Richard Lambert, (Applicants) v. Service Employees' Union Local 478 AFL, CIO, CLC, (Respondent) v. Empire Hotel of North Bay, (Intervener). (*Dismissed*).

1136-82-R: Elaine M. Simpson, Don Buchanan, Dennis L. Cornell, Thoi Tran, Nhi Tran, (Applicants) v. Commercial Workers' Union Local 486, (Respondent). (*Withdrawn*).

1158-82-R: George Schraeder, (Applicant) v. United Steelworkers of America, (Respondent). (*Granted*).

1174-82-R: Extendicare Ltd., (Applicant) v. London and District Service Workers' Union, Local 220, A.E.I.U., A.F.L., C.I.O., C.L.C., (Respondent) v. Joan Campbell, (Employee). (*Granted*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

0802-82-M: Corporation of the City of Brockville, (Employer) v. United Brotherhood of Carpenters and Joiners of America, (Trade Union). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1268-82-U: Belkin Toronto Paperboard Mill, A Division of Belkin Packaging Ltd., (Applicant) v. Canadian Paperworkers' Union, Local 1112, Clayton Branton, David Sooley, Wayne Morasch and Jim McLean, (Respondents). (*Granted*).

1299-82-U: Biwest Inc., (Applicant) v. Canadian Union of Public Employees and its Local 234B, Steve Backs and others listed on Schedule "A", (Respondents). (*Withdrawn*).

1309-82-U: Ferranti-Packard Transformers Ltd., (Applicant) v. United Steel Workers of America, Local 5788 John Tiffin, Stan Porzuczcek, Len Berry, M. Renner, R. Deprez, R. Valente, C. Jordan, Tom Orsborn, L. Dionne, S. Doig, and J. Theriault, (Respondents). (*Withdrawn*).

1397-82-U: The Sigal Shirt Company Limited, (Applicant) v. Roy Martins, Gemma Torroni, Lai Choi, Stephi Grahek, Maria Baltazara, Mrs. Shuet Tse, Pi-Chi Chen, Annie Cassman, Santina Morana, Filomena Madeira, Teresinha Bento, Kim Nguen, Gloria Mota, Chandardai Persaud, Maria Espinola, Bashiran Mohammad, Yuk-Ha Lee, Paola Dicarolo, Angela Visconti, Maria Maiato, Ines Freitas, Michelina Dimauro, Lai Yeh, Nella Giuga, Yau Ming Ng, Maria Maturi, Kwok Man Ng, Maura Genitti, Leontina Martellacci, Maria Martins, Teresa Brevetti, Phuong Lam, Isabel Martins, Wai Ching Wu, Maria Freitas, Olga Carreiro, Maria Rodrigues, Rita Ferrante, Angela Lopardo, Tak-Chan Cho, Calogera D'Anna, Addolorata Laselva, Maria Ponte, Ana Oliveira, Darshan Padan, Paria Pollice, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1134-82-U: Cara Drywall Services, Woodbridge Drywall Limited, Woodbridge Drywall (1982) Limited, A-P Drywall Systems, (Applicants) v. United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, Gus Simone, Walter Leaman, Len Ballantyne, Ken Weller, William Morrice, Helmut Redermeier, Louis Jugloff, Don Connors, and Bill Johnston, (Respondents). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1994-79-U: Dennis H. O'Keeffe, (Complainant) v. 410874 carrying on business as Concrete Construction Supplies, Concrete Supplies of Windsor Inc., M.B.L. International Contractors Inc., Concrete Construction Supplies Limited, (Respondents) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 880, (Intervener). (*Dismissed*).

0197-81-U: Stanley Dwyer, (Complainant) v. United Automobile Aerospace & Agricultural Implement Workers of America U.A.W. – International Union United Automobile, Aerospace & Agricultural Implement Workers of America U.A.W. Local 1285, (Respondent) v. Chrysler Canada Limited, (Intervener). (*Dismissed*).

2082-81-U: The International Association of Bridge, Structural and Ornamental Ironworkers Local 721, 736, 759, 765 and 786, and Kenneth Childs, Allan MacIsaac, John Donaldson, Larry Baillie, Gordon Verdecchia, and Donald Melvin on their own behalf, and on behalf of each and every member of the aforementioned trade unions, and on behalf of the said local trade unions, (Complainants) v. The International Association of Bridge, Structural and Ornamental Ironworkers, Norman Wilson and James Phair, (Respondents). (*Granted*).

2733-81-U: Isabelle Bastien, (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, and its Local 2098, (Respondent) v. Seagram Company Ltd., (Intervener). (*Dismissed*).

0118-82-U: Ontario Public Service Employees Union, (Complainant) v. Hamilton Medical Laboratories, (Respondent). (*Withdrawn*).

0233-82-U: John Cooper, (Complainant) v. International Brotherhood of Painters and Allied Trades, Local 1590, and Bagwell Coatings Canada Ltd., (Respondents). (*Withdrawn*).

0349-82-U: Madeline Gilligan, (Complainant) v. Ron Schroeder and Jim Bishop and U.A.W. of America, Local #252, (Respondents). (*Withdrawn*).

0430-82-U; 0478-82-U; 0516-82-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Belarus Equipment of Canada Ltd., (Respondent). (*Withdrawn*).

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0930-82-U: United Brotherhood of Carpenters and Joiners of America, Local 494, (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local 1256, (Respondent). (*Granted*).

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1029-82-U: International Beverage Dispensers' and Bartenders' Union, Local 280, (Complainant) v. Wheat Sheaf Tavern, (Respondent). (*Withdrawn*).

1031-82-U: Everette Chapelle, (Complainant) v. York Condominium Corp. #300, (Respondent). (*Withdrawn*).

1035-82-U: Canadian Union of Public Employees Local 839, (Complainant) v. Chedoke-McMaster Hospitals (Chedoke Division), (Respondent). (*Withdrawn*).

1037-82-U: United Electrical, Radio and Machine Workers of America (UE), (Complainant) v. Westinghouse Canada Inc., (Respondent). (*Withdrawn*).

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1066-82-U: Mark W. Downey, (Complainant) v. Teamsters Chemical and Allied Workers Local 1552, (Respondent). (*Withdrawn*).

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1155-82-U: Manjeet Kaur Khattria & Others, (Complainant) v. Temple Wire Products & Local 847 Union Laundry and Linen Drivers Industrial, (Respondent). (*Withdrawn*).

1160-82-U: Canadian Union of Operating Engineers and General Workers, (Complainant) v. Midmetro Plastics Limited, (Respondent). (*Withdrawn*).

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1236-82-U: Health, Office & Professional Employees, division of Local 206, Retail, Commercial & Industrial Union, chartered by the United Food & Commercial Workers International Union C.L.C., A.F.L., C.I.O., (Complainant) v. Mapleton Manor Nursing Home, C.H.P. Developments Limited, (Respondent). (*Withdrawn*).

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1326-82-U: Christian Labour Association of Canada, (Complainant) v. Seniorcare Retirement Residence, (Respondent). (*Withdrawn*).

1327-82-U: Ben Cook, (Complainant) v. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 879, (Respondent). (*Withdrawn*).

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2438-81-JD: International Association of Bridge, Structural and Ornamental Ironworkers, Local 721, (Complainant) v. Campbell-Cox Ltd. Millwrights Local 2309, (Respondents). (*Dismissed*).

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0921-82-M: Canadian Union of Public Employees, Local 71, (Applicant) v The Public Utilities Commission of Cochrane, (Respondent). (*Dismissed*).

0990-82-M: Canadian Union of Public Employees, (Applicant) v. The Dufferin-Peel Roman Catholic Separate School Board, (Respondent). (*Withdrawn*).

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1607-81-M: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 et al, (Applicant) v. MHG International Ltd., (Respondent) v. Boilermaker Contractors' Association, (Intervener). (*Dismissed*).

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0622-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Newtec Construction Ltd., (Respondent). (*Withdrawn*).

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*Ontario Labour Relations Board,
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ISSN 0383-4778



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1214-82-U United Steelworkers of America, Applicant, v. The Adams Mine, Cliffs of Canada Ltd., Manager, Respondent

Interference in Trade Unions – Unfair Labour Practice – Union campaign supporting political party in federal by-election – Employer banning political campaigning on company premises – Whether interference with protected right

BEFORE: George W. Adams, Q.C., Chairman and Board Members J. A. Ronson and H. Kobryn.

APPEARANCES: *Brian Shell, Dennis Fordyce and Marcel Desjardins for the applicant; and C. G. Riggs, B. J. Bowlby and J. L. Merrell for the respondent.*

DECISION OF GEORGE W. ADAMS, Q.C.; December 8, 1982.

1. This is a complaint filed on behalf of all employees of the respondent represented by the complainant in the production and maintenance bargaining unit and in the office, technical and clerical bargaining unit alleging that the respondent has acted contrary to the provisions of sections 3, 64, 66(a) and 66(c) of the *Labour Relations Act*.

2. Given the nature of the matter, the complaint was placed before this panel of the Board in order that the complainant show cause that the Board had jurisdiction and if so whether the required jurisdiction ought to be exercised.

3. The complainant and respondent are parties to office and production collective agreements effective from March 1st, 1982 until March 1st, 1985. For the purposes of this decision it is accepted that the complainant is an affiliate member of the Canadian Labour Congress (hereinafter the CLC) and that the Canadian Labour Congress has political and organizational ties with the New Democratic Party of Canada, a registered federal political party (hereinafter NDP). It would also appear that the complainant is an affiliate member of the NDP. It is further accepted that the CLC and NDP have participated together on a number of political, social and economic campaigns.

4. On or about September 26th, 1982 the complainant commenced a campaign in support of the CLC and its political affiliate, the New Democratic Party of Canada. This campaign was launched in connection with the by-election in the federal constituency of Timiskaming scheduled for October 12th, 1982. The Board was advised that the union campaign included the posting of union notices on union bulletin boards by officers of the local union. These notices identified members of the union who were acting as canvassers in the campaign. All canvassers were members of the complainant and employees of the respondent. No outside people were involved in the campaign on the respondent's property. The Board was advised that canvassers were instructed by the complainant to discuss various political and economic issues with and distribute literature to employees who approached or were contacted by the canvasser. All such discussions and activities, while on the respondent's premises, were to be confined to the non-working hours of both the canvasser and the solicited employee. More

specifically, the Board was advised that employees were told that the canvass should take place at lunch hour, on coffee break, before work and after work.

5. Counsel for the complainant submitted that no canvassing was done on company time and that there had been no interference with the orderly operation of the mine. Counsel for the respondent did not agree with this submission. While maintaining that the Board had no jurisdiction to inquire into the complaint, counsel for the respondent maintained that the campaigning did interfere with the mine operations and that the respondent had received complaints, presumably from supervisors and bargaining unit employees. We are of the view it is not necessary to make a determination on these factual differences given the conclusion we have arrived at.

6. The notice on the union bulletin board took the following form:

ON THE JOB CANVASS
SPONSORED BY THE
CANADIAN LABOUR CONGRESS
AND YOUR
UNION

HAVE YOU BEEN CANVASSED?
IF NOT,
CONTACT A CANVASSER.

CANVASS PERIOD:
SEPTEMBER 15-27

CANVASS ORGANIZERS:

CANVASSERS:

*IF YOU WANT TO HELP PLEASE CONTACT YOUR
 CANVASS ORGANIZER — OR — CALL US AT*

567-7733

567-8355

The literature distributed by canvassers was in English and French and read:

You choose.

Before reading the next page, please look over the three topics below. Check off the statement which most closely reflects your views on the subject.

JOB SECURITY:

- A. Job creation should be the government's top policy priority.
- B. Full employment is not a realistic objective for government.
- C. Unemployment will have to rise to try and bring down inflation.

INTEREST RATES:

- A. Canadian interest rates must follow U.S. interest rates.
- B. There is no alternative to the current interest rate policy.
- C. Interest rates must be lowered to a maximum of one point above the rate of inflation to create more jobs.

FUEL COSTS:

- A. Canada's oil price must be increased to the international price.
- B. The scheduled oil price increases are not excessive.
- C. Oil prices are high enough . . . further price increases will mean unnecessary job losses.

Which party speaks for you?

JOB SECURITY:

New Democrats: "We need a realization that the number one priority for this nation is to begin the tough long-run journey to job security."

Ed Broadbent, May 22, 1982

Conservatives: "Mr. Hawkes and Mr. McDermid (Conservative MP's) wish to be on record in disassociating themselves from the use of the words full employment."

Tory members on All Party Task Force on Employment Opportunities in the Eighties

October 1981

Liberals: "... there is no doubt that to meet these objectives (keeping wage increases to 6% and 5%) the corporations will have to lay off people"

Jean-Luc Pepin, August 13, 1982

INTEREST RATES:

Liberals: "There is no way by which it is possible to insulate Canada against interest rate changes in the U.S."

Allan Rock, January 26, 1982

Conservatives: "We have looked for a solution other than the (current Liberal) government's, but we couldn't come up with an alternative."

Joe Clark, May 4, 1982

New Democrats: "The Government of Canada must act immediately to bring down the Bank of Canada rate to 1 percentage point above the rate of inflation."

Ed Broadbent, June 22, 1982

FUEL COSTS:

Conservatives: "We've already indicated that we think that (oil) prices have to increase more rapidly and that Canada has to go to World oil prices more rapidly . . . if we continue on the present course, we will never get to World oil prices."

John Crosbie, July 26, 1979

Liberals: "... I do not see it as being in the public interest to reopen that (Ottawa-Alberta agreement that will increase oil prices by 8¢/gallon on September 1, 1982 and 14¢/gallon every 6 months to 1986) contract at this time."

Pierre Trudeau, June 29, 1982

New Democrats: "Oil prices that are scheduled to go up . . . will lead to 22,000 fewer jobs in Canada. The Prime Minister must urge the premiers of the producing provinces to forego, along with the federal government, this increase."

Ed Broadbent, June 29, 1982

We hope you found this questionnaire helpful in finding out who speaks for you.

This Spring, the Ontario Federation of Labour circulated thousands of copies of a "HELP YOURSELF" survey to Northern Ontario workers. The results of that survey told us that the three issues here are the ones you consider most likely to affect your future.

We want you to know exactly what the major political parties say about these three important issues when there is no election going on.

We researched these three areas and have now presented you with the positions of the three political parties who are seeking your vote. You are now allowed a golden opportunity to vote for the candidate whose party represents your point of view.

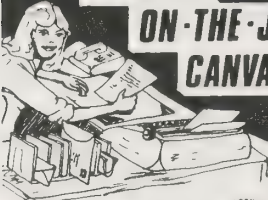
On October 12, support the candidate whose party speaks for you. And speaks for your future.

VOTE

ON OCTOBER 12

7. The information pamphlet describing the objectives of the on-the-job canvass contain the following information:

HELP YOURSELF WITH THE ON-THE-JOB CANVASS



Thank you for answering the survey. By filling in the information below, you will enable us to contact you with more information about the On-the-Job Canvass

Name: _____

Union: _____

Local: _____

Phone No.: _____

Address: _____

(Please Print)

HERE'S WHAT SOME MEMBERS SAY ABOUT THE ON-THE-JOB CANVASS

The 'Help Yourself' survey gave us some very useful information on which issues most affected our membership. We also used the on-the-job canvass to show the federal government that our members were strongly opposed to the taxation of their airline passes - and it worked!"

Angela Schiro, B.C.

"The provincial election on-the-job canvass got our members talking about issues that affected them and about the political options they had. I'm sure it really helped get the NDP elected because our members saw their policies made most sense to us. We also used an on-the-job canvass in our last round of negotiations with Salweeny - with great results."

Susan Reznik, Manitoba


"We ran a number of canvasses on important issues. It's really helped strengthen the local's communication and shown the membership we're interested and want to act on their concerns."

Kevin Simpson, Ontario


"With the Nova Scotia government threatening trade union rights it is important that we be able to communicate with our members effectively. Our survey canvass was a good first step in that direction."

Betty Warrell, Nova Scotia


the ON-THE-JOB WHAT?



2 MILLION WORKERS CAN MAKE A DIFFERENCE



the "ON-THE-JOB" CANVASS!



ON-THE-JOB CANVASS

INFORMATION SURVEY

Let us know how you feel about the "On-the-Job Canvass" by answering the following questions.

1. I have heard previously of the On-the-Job Canvass			
2. I have received training in the techniques of the On-the-Job Canvass			
3. My local has been involved in an On-the-Job Canvass			
4. I believe my union should do a regular On-the-Job Canvass of the members			
— on bargaining			
— on workplace issues			
— on political issues			
5. I would like more information about the On-the-Job Canvass			
6. I would like training in the techniques of the On-the-Job Canvass			

WHAT IS IT?

It is building and strengthening the union's communications. It is union member talking to union member about job concerns and political issues that affect each of us.

WHY DO IT?

Employers and governments only listen to us when they know we stand united. The On-the-Job Canvass allows union members to express their concerns to help make the union's solutions to those concerns, and thus to speak with one voice to employers and governments.

WHEN CAN IT BE DONE?

In general, it can be done at work during breaks and any other time when casual conversations normally take place. But it is not a one shot deal. Success must be built on regular communication.

WHERE HAS IT BEEN DONE?

By literally dozens of unions in just about every part of the country. The most spectacular success was in Manitoba where two province wide On-the-Job Canvasses were conducted. One of them was important in defeating a right wing Conservative government and electing a progressive NDP government in its place.

Other provinces have completed or soon will be conducting On-the-Job Canvasses.

Several individual unions or locals of unions have conducted On-the-Job Canvasses dealing with such things as health and safety, contract proposals, and many other topics.

8. On or about September 20th, 1982 the respondent stated in a notice to all employees, under the signature of Bruce Taylor, Mine Manager, that any and all forms of canvassing, campaigning or posting of materials of any type on company property was prohibited unless authorized by the respondent. The notice read:

NOTICE

September 20, 1982

TO: ALL EMPLOYEES

FROM: BRUCE W. TAYLOR,
MINE MANAGER.

SUBJECT: ELECTION CAMPAIGN

You are reminded that any form of canvassing, campaigning or posting of materials of any type on Company property, bulletin boards, or equipment is not permitted unless authorized by management.

It has been noted that political campaign material is appearing on Company property. This is to discontinue and all political type campaign questionnaires and material is to be removed immediately.

Political campaigning is not permitted on the Adams Mine property at any time.

9. The complainant's particulars state that on or about September 21st, 1982, Dennis Fordyce, Vice-President of the Complainant's Local Union 6409, was told by Mr. Taylor that no political campaigning was to take place on mine property. On or about September 22nd, 1982 Fordyce was told by Taylor that the canvassing was interfering with the orderly operation of the mine and must cease. On or about September 24th, 1982 Fordyce was told by John Merrill, Personnel Manager, that there would be disciplinary repercussions taken against members of the complainant if the campaign and canvassing as aforesaid continued.

10. The respondent takes the position that it has never permitted political canvassing on its properties save in parking lots and the complainant submits that at least two prior campaigns have been conducted by the complainant on the respondent's premises in the same manner as in the instant case. Again, we are of the view it is not necessary to resolve this factual difference.

11. Article 2 of the Constitution of the complainant states the objects of this trade union in the following manner:

ARTICLE 11

Objects

First. To unite in this industrial union, regardless of race, creed, color or nationality, all workers and working men and working women eligible for membership, employed in and around and in transportation related to iron, steel, aluminum, nonferrous metal and allied manufacturing, mining, chemical, processing and fabricating mills, factories and establishments in the United States and its territories, Canada, and insular areas adjacent thereto.

Second. *To establish through collective bargaining adequate wage standards, shorter hours of work and improvements in the conditions of employment for workers in industry.*

Third. *To engage in educational, legislative, political, civic, social, welfare, community and other activities; to advance and safeguard the economic security and social welfare of workers in industry, the International Union, its Local Unions and the free labor movements of the United States, Canada and the world; to protect and extend our democratic institutions and civil rights and liberties; and to perpetuate and extend the cherished traditions of democracy and social and economic justice in the United States, Canada and the world community.*

Fourth. To function as an autonomous International Union affiliated with other international unions in national and international federations in the United States, Canada and the free world; to unify and solidify the International Union, its Local Unions and the entire labor movement; and to provide financial and other aid and assistance to labor and other organizations in the United States, Canada and other parts of the world.

Fifth. To take all steps and actions consistent with the Constitution and policies of the International Union to implement and carry out the objects, rights, activities and responsibilities of this organization.

(our emphasis)

12. The complainant requests:

(a) an order that the respondent cease and desist from its interference with the complainant's lawful activities, namely, participation by the complainant and its members in its campaign in support of the Canadian Labour Congress and its political affiliate, the New Democratic Party of Canada, launched in connection with the by-election in the federal constituency of Timiskaming scheduled on October 12th, 1982; and

(b) a declaration that the on-the-job campaign by the complainant and its members on company premises on non-working hours constitutes a lawful activity of the complainant and as such is protected by the *Labour Relations Act*.

Submissions

13. The complainant submits that the on-the-job canvass is a lawful trade union activity within the meaning of section 3 of the *Labour Relations Act* and for that reason persons participating in such activity are protected by sections 64, 66 and 70 of the *Labour Relations Act*. For authority that section 3 provided a sufficiently broad substantive grounding to this complaint, the Board was referred to *St. Catharines General Hospital*, [1982] OLRB Rep. Mar. 441 at ¶35; *Jarvis v. Associated Medical Services Limited*, 61 CLLC ¶16,218 at p.980; *Audio Transformer Company Limited*, [1969] OLRB Rep. Nov. 994; *Eastex Inc. v. N.L.R.B.*, 98 LRRM 2717 (USSC). Reference was also made to section 1(1)(p) of the Act providing a broad definition of trade union and to a number of arbitration cases that have recognized certain kinds of political activity as trade union activity for the purposes of a collective bargaining agreement. These latter cases included: *Re Air Canada and Canadian Airline Employees Association* (1980), 27 L.A.C. (2d) 289 (Simmons); *Re Lake Ontario Steel Company Limited and United Steelworkers, Local 6571* (1978), 20 L.A.C. (2d) 432 (Abbott); *United Electrical, Radio and Machine Workers of America in Re Canadian General Electric Company, Limited* (1951), 3 L.A.C. 917 (Laskin); *Re Texpack Limited and Canadian Textile and Chemical Union* (1973), 3 L.A.C. (2d) 38 (Hanrahan); *Inco Limited and United Steelworkers of America, Local 6166*, January 15th, 1981 (W.R. Martin); and *The Corporation of the Borough of Etobicoke and The Borough of Etobicoke Civic Employees' Local Union No. 185*, June 3rd, 1981 (R.H. McLaren). Finally, the complainant submits that because the activity was protected activity within the meaning of section 3 of the Act, the respondent could not interfere with the activity provided that the canvassers were not materially interfering with production or creating a serious disturbance or obstruction on company premises. For authority that lawful union activity may be carried on by employees on company premises on non-working time, the Board was referred to *Jarvis v. Associated Medical Services* (*supra*); *Audio Transformer Company Limited*, *supra*; *Cominco Limited and Canadian Association of Industrial, Mechanical and Allied Workers, Locals 23, 24, 25, 26 and 27 and United Steelworkers of America, Locals 480, 651, 8320, 9705 and 9672*, [1981] 3 Can.LRBR 499 (BCLRB); *American Airlines Incorporated, Toronto, Ontario and Brotherhood of Railway, Airline and Steamship Clerks, Freighthandlers, Express and Station Employees*, [1981] 3 Can.LRBR 90 (CLRB); *Republic Aviation Corporation; Le Tourneau Company of Georgia v. N.L.R.B.* (1945), 16 LRRM 620 (USSC); *N.L.R.B. v. Babcock and Wilcox Company* (1956), 38 LRRM 2001 (USSC); and *N.L.R.B. v. Magnavox Company* (1974), 85 LRRM 2475 (USSC). *Bell Canada and Communication Workers of Canada* (unreported CLRB decision, August 22nd, 1975; application for judicial review dismissed [1976] 1 F.C.459); *International Association of Machinists and Aerospace Workers, Automotive Lodge* (1857) and *Jim Patison Industries Limited*, [1979] 2 Can.LRBR 517 (BCLRB).

14. It is submitted on behalf of the respondent that the political canvassing, in substance, put forward the interests of the NDP and not the collective bargaining

interests of the complainant and grievors. It is accordingly submitted that the *Labour Relations Act*, a collective bargaining statute, does not apply. Counsel contends that section 3 of the Act cannot be construed or interpreted in the abstract but has to be given a meaning consistent with the ambit and scope of the *Labour Relations Act*. It is counsel's submission that sections like sections 11, 64, 66 and 71 make it clear that the legislation protects activities of a trade union pertaining to the collective bargaining process and to employees as employees. Counsel emphasized that the respondent had not discriminated between political parties and had not, itself, engaged in political campaigning on its own property. Alternatively, it is submitted that section 66(a) has no application because the actions complained of did not affect the employment of the grievors. It is further submitted that sections 11 and 71 which demonstrate encroachment on property rights by the Act are limited to organizing initiatives. Counsel submits that while the "campaigning" by the complainant may be a lawful activity, it is not a protected activity within the meaning of the Act. Counsel suggests that the complainant's position, if accepted, runs perilously close to providing statutory protection to a political party supported by organized labour. Finally, it is submitted the respondent has shown no "anti-union animus" by its no-solicitation rule in that the rule was applied even-handedly and for a bona fide business purpose.

REASONS

15. This Board and other labour Boards have dealt with the right of employees to engage in protected activity on company property but during non-working hours. It is therefore useful to review the general principles applicable to collective bargaining and union activity on company premises before considering the particular activity in issue in this case.

16. Sections 3, 64, 66, 70, 11 and 71 provide as follows:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a

member of a trade union or was or is exercising any other rights under this Act;

- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

11. Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

71. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.

Also of relevance are sections 1(1)(b), 1(1)(e), 1(1)(p), 5(1), 7(3) and 14. They provide:

1.-(1) In this Act,

(b) "bargaining unit" means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them;

(e) "collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of

the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement;

(p) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

5.-(1) Where no trade union has been certified as bargaining agent of the employee of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may, subject to section 61, apply at any time to the Board for certification as bargaining agent of the employee in the unit.

7.-(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

14. Following certification, the trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement.

17. It has been noted that the workplace is the one location where employees are brought together on a daily basis; where they share common interests; and where they traditionally seek to persuade fellow workers in matters affecting their status as employees and as union members. *Gale Products* (1963), 53 LRRM 1242 at 1243 (NLRB); *N.L.R.B. v. Magnavox Company* (1974), 85 LRRM 2475 (USSC).

18. The workplace is therefore the most effective location for "union activity" to be carried out. A policy denying this forum to employees would obviously impair the effective exercise of statutory rights particularly the right of self-organization. On the other hand, company premises constitute private property and are established for the primary and important purpose of carrying on business activity. The above sections give some indication how the statute has attempted to balance these legitimate interests. Two lawful activities clearly contemplated within the scope of section 3 are the organization of a trade union and collective bargaining. See *Jarvis v. Associated Medical Services Inc.* (1961), 61 CLLC ¶16,218 at p.980. Section 64 provides that no employer and no person (reading selectively) shall interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union. Similarly, section 66(c) prevents an employer, among others, from seeking, by any kind of threat or by imposition of any kind of penalty or by any other

means, to compel an employee to cease to exercise any other rights under this act. An employer who prevents his employees from attempting to organize a trade union while they are on company premises by a broadly drafted no-solicitation rule backed by disciplinary action runs the risk of violating these sections. See *Jarvis v. Associates Medical Services*, *supra*, page 980; *Audio Transformer Company Limited*, [1969] OLRB Rep. Nov. 994 at 1002. This, of course, does not mean an employer is deprived by the Act of maintaining productivity or discipline or of securing his property from encroachment by strangers with whom he has no relationship. Section 71 makes it clear that no person is authorized by the Act “to attempt at the place at which an employee works to persuade him *during his working hours* to become or refrain from becoming or continuing to be a member of a trade union”. [our emphasis] The purpose of this section is to afford an employer an answer to the charge that he has interfered with a person’s rights under section 3 of the Act by preventing that person from attempting to solicit an employee during working hours. The section recognizes the employer’s bona fide interest in maintaining an efficient business enterprise and the fundamental obligation of employees to work in return for compensation. But section 71 does not speak to activities outside of an employee’s working hours while on his employer’s premises. Labour boards have consistently interpreted the phrase “working hours” to refer only to the period of time during which an employee is required to undertake his duties and responsibilities. Therefore the section does not apply to those periods of time an employee is on company property before shift, during coffee break, during lunch break, or after shift. This is so even if the employee is being paid for such time, otherwise an employer could prevent the exercise of statutory activity by the simple expedient of a money payment. The approach of the statute and this Board has been to create a meaningful balance between the statutory rights of employees and the proprietary and commercial interests of employers. See *Jarvis v. Associated Medical Services Inc.*, *supra*; *Audio Transformer Company Limited*, *supra*; *Jim Pattison Industries Limited*, [1979] 2 Can.LRBR 517 at 520–21; *Cominco Limited*, [1981] 3 Can.LRBR 499 at 503–504. See Notes, *Reversal of N.L.R.B. Policy Regarding No-Solicitation Rules* (1982), 34 Baylor L. Rev. 143 at 148. Because the workplace is a most appropriate theatre for membership solicitation, it has been considered reasonable and fair to construe break and lunch periods as non-working time belonging to employees to use as they see fit so long as they do not engage in disorderly conduct or adversely affect other legitimate business interests of the employer. Where they decide to use this time to engage in protected trade union activity, this statute and the remedies available under it apply. To this extent, property rights have been encroached upon by the statute. And while this is a factual issue in any particular case, union solicitation during non-working time will not generally interfere with the employer’s legitimate management interests. Any interference must be real and constitute more than a minor annoyance or inconvenience.

19. Dealing with the permissible range of employee activity during non-working time, arbitrator Laskin (as he then was) in *Re Canadian General Electric Company, Limited*, *supra*, (1951), expressed the balance of interests in a related fashion more than thirty years ago (919–920):

The half-hour supper period involved in this case is paid time, but not necessarily working time. While supervision is on the job and employees cannot leave the department they are not otherwise

controlled. This Board leaves aside such things as damage or danger to Company property or machinery, or interference with employees who choose to work. There is no doubt of the liability to discipline of any employee whose conduct produces any such consequences. What objection can there be, then, to solicitation of one employee by another on Company property at a time when neither is required to work and neither is working and there is no interference with any who are at work? The Collective Agreement between the parties gives no explicit directions on this question. There is only the implicit reach of the Union recognition clause on the one hand, and the general disciplinary power reserved to the Company on the other hand. In such circumstances the decision must be found in weighing the various interests involved.

The union interest in furthering its programme and on increasing its strength as the accredited bargaining agent is obvious. It is an interest, which is, in a sense, independent of any statutory recognition, but with statutory recognition such as exists in Ontario, it enjoys a status which is given positive protection against employer interference. The interest of the employer is the uninterrupted operation of its plant, involving as a corollary disciplinary power over employees both as regards the discharge of their duties and the protection of plant and equipment. If an employee is on free time, as for example, on his lunch hour, is there any impropriety in talking baseball or art or Union? Of course, under a regime of individual bargaining and under circumstances where there is no firm contract of employment, employers need not concern themselves with questions of freedom of communication or of association or of utterance. Discipline may be imposed to the point of discharge for any reason which appeals to management. Does a regime of Collective Bargaining make any difference? It does to the extent to which a Collective Agreement makes an award of discipline subject to the test of reasonable cause. The Collective Agreement between the parties in this case contains this substantial qualification of unfettered prerogative.

Two general arguments were advanced in justification of the Company's right to discipline for distributing literature during the half-hour supper period. It was contended in the first place that the Union and the employees must find their rights in the Collective Agreement, and that unless the Collective Agreement confers rights, the Company remains in sole and full control of the situation. This contention is basically, the argument that pre-collective bargaining employer prerogatives remain unimpaired except as expressly limited. Whatever the merit of the argument, the Company is obligated under its Collective Agreement with the Union to base its exercise of discipline on reasonable cause. This is a sufficient recognition of employee rights to require mutual accommodation between Company and employees. The second argument

was that Miss Stone and others had been expressly warned against such activities as those in question here. This argument is a question-begging one because its validity depends on whether management was entitled to give the warning.

The issue in this case comes down, hence, to a particular consideration of the nature of the half-hour supper period and to the competing interests of the Union and management in the use of that period. This Board has already described the nature of the supper interval. While it is paid time it is not controlled time save as Company interest might demand supervision against damage or danger to property or interference with people remaining at work. Beyond this, what conceivable interest would the Company have in forbidding communication between employees? To say that the communication might give rise to altercations or disturbances between employees merely illustrates an occasion for interference which could extend to any period of time and has no special significance relative to this particular supper period. In truth, the more one considers the situation, the more one is driven to the conclusion that the Company's general position on the half-hour supper period is a mere projection of the rhyme "he who pays the piper calls the tune". The rhyme would be apt enough if employees were expected or required to remain at work or if production was continuing. Short of this, and short of any such occasions for discipline as have already been mentioned, the Company has no interest to protect which would warrant curtailing freedom of communication between employees.

However, it must be emphasized that an arbitrator under a collective agreement is not limited to administering rights arising under the *Labour Relations Act* as is this Board.

20. An employer who nevertheless enforces a no-solicitation rule that has the effect of preventing employees from, for example, soliciting union membership on company premises during non-working time will be found by this Board to have intended this result and therefore to have acted contrary to section 66(c) and section 64 of the Act unless the employer can establish by cogent evidence that its purpose was to preserve property, to prevent serious disturbance, ensure productivity or preserve plant safety. See *Audio Transformer Company Limited, supra*, page 1003. Where the latter is established, union solicitation that is seriously disruptive of managerial interests can be regulated by an employer even though the incidental affect is to constrain protected activity. In such circumstances, the Board construes the employer's actions as aimed solely at the preservation of its bona fide right to manage.

21. It is to be noted that the statute provides a more specific and different balance between an employer's property interest and the right of non-employees to solicit union membership from employees on company property. In this regard, section 11 provides that where employees of an employer reside on the property of the employer, the employer when directed by the Board, shall allow a representative of a trade union access to the property for the purpose of attempting to persuade the employees to join

the trade union. Therefore, the statute acknowledges the right of an employer to raise his property rights against strangers to the employment relationship even though the strangers are union organizers and their involvement on company property during non-working time would not interfere with any bona fide management interest. The attempt here is to accommodate the right of property and the right to organize “with as little destruction of one as is consistent with the maintenance of the other”. See *N.L.R.B. v. Babcock and Wilcox Company* (1956), 38 LRRM 2001 at 2004. If employees have the right to carry on organizing activity on company premises, it does not seem an unfair balance of interests to limit strangers to the usual channels of communication with those employees off company premises. See also the approach of the Supreme Court of Canada in dealing with competing proprietary and collective bargaining claims between strangers, in a case involving an employer’s landlord and striking employees in *Harrison and Carswell* 75 CLLC ¶14,286 (SCC).

22. From this analysis we arrive at the following general principles:

- (a) No-solicitation or no-distribution rules which prohibit union solicitation on company property by employees during their non-working time are presumptively an unreasonable impediment to self-organization and are therefore invalid; however, such rules may be validated by evidence that special circumstances make the rule necessary in order to maintain production or discipline;
- (b) No-solicitation or no-distribution rules which prohibit union solicitation by employees during working time are presumptively valid as to their promulgation, in the absence of evidence that the rule was adopted for a discriminatory purpose or applied unfairly; and no-solicitation or no-distribution rules which prohibit union solicitation by non-employee union organizers at any time on the employer’s property are valid in the absence of an application for a direction pursuant to section 11.

23. The issue before the Board is whether or not the posted notices and distribution of the above reproduced pamphlet by members of the complainant (who are employees of the respondent) are governed by these same principles.

24. The substance of the complainant’s argument is that a trade union is defined by the Act only “to include” the objective of regulating relations between employees and employers and, therefore, that all other lawful activities of a trade union fall within the meaning of section 3 and constitute “other rights under this Act” as that phrase is used in section 66. Implicit in this submission is that trade unions can, by unilaterally setting their objectives, expand or contract the scope of statutory protection afforded to them and their members by the Act. This somewhat breathtaking proposition requires careful analysis.

25. As the complainant’s objectives reveal, it is committed to activities, including collective bargaining, aimed at improving the general welfare of employees and securing an atmosphere more favourable to the activities of unions generally. Realisti-

cally, certain trade union objectives cannot be achieved through negotiations such as public education, social insurance of various kinds, adequate housing and effective economic management of the economy. Other objectives can be achieved much faster through legislation such as minimum wages, maximum hours, health and safety standards, minimum union security provisions, and labour law reform generally. Indeed, the passage of the *Labour Relations Act* itself is, in part, a product of broader trade union activity. The Canadian Labour Congress, to which many of Canada's trade unions are affiliated, has always had as one of its purposes, the focusing of organized labour's broader objectives. It is therefore clear that trade union activity involves more than just face to face collective bargaining negotiations in the pursuit of employee interests. The formal certification of a trade union does not change this organic nature of a trade union organization or its relationship to its members.

26. On the other hand, the dominant purpose of the *Labour Relations Act*, as discerned from its provisions, is much more narrow and as stated in the preamble, centers on the furtherance of "harmonious relations between employers and employees by encouraging the practices and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". To this end the statute creates an elaborate framework to allow employees to freely designate trade unions as their exclusive bargaining representatives in their relationships with their employers. Once certified, a trade union legally speaks for bargaining unit employees with respect to "terms or conditions of employment or the rights, privileges or duties of employers". (See, for example, sections 1(1)(e), 5, 7, 15, 49, 50 and 67). The Act deals with a restricted but vital area of trade union interests – the collective bargaining process. It is this dominant purpose of the statute and all related activity necessarily incidental to this purpose which demarcate the Board's jurisdiction.

27. This observation with respect to the fundamental purpose and scope of the Act does not minimize the Board's role in the labour relations community nor does the observation decide this case. There is much related activity that is necessarily incidental to the Act's dominant purpose. This is the point of such cases as *C.P.R. v. Zambri* 62 CLLC ¶15,407 (dealing with the protection afforded to striking employees); *Valdi*, [1980] OLRB Rep. Aug 1254, (dealing with the statutory rights of shop stewards); and *St. Catharine's General Hospital, supra*, (dealing with the freedom of speech of a local trade union president). The Act does not spell out each and every right and obligation of labour and management. This Board is left with the task of applying the Act's general language in the light of an infinite variety of circumstances which may arise. A rigid scheme of regulation is avoided and flexibility is provided although all within the limitations necessary to effectuate the dominant purpose of the Act.

28. This case pertains to the ambit of workplace communications by a trade union with bargaining unit members enforceable under the Act. The applicant placed much reliance on section 1(1)(p) defining a trade union, in effect, as an organization of employees formed for purposes "that include" collective bargaining. We agree this is statutory recognition of the purpose of trade unions over and above the representation of employees in collective agreement negotiations. But that definition does not create positive statutory rights. Rather, it avoids a potential disentitlement to certification because of objectives not restricted to collective bargaining matters. Other statutes are

considerably more confining. See *Crown Employees Collective Bargaining Act*, R.S.O. 1980 c.1083 (1)(1)(g). Thus, it is not enough for the applicant to point to its constitution and the long-standing interest of trade unions in political action to entitle it to the relief requested. Rather, the Board must be satisfied that the statutory right contended for is consistent with and arises out of the dominant purpose of the Act as discerned from its provisions and preamble.

29. One reason this case is difficult is that heretofore the parties in this jurisdiction have been relatively inactive in requesting this Board to elaborate rights implicit in the statute in contrast to their counterparts in the United States. See *Eastex Inc. v. NLRB* (1978) 98 LRRM 2717 at 2720, footnote 13. As a result, there are only the few Board cases mentioned above that provide a decisional foundation for the applicant's complaint. Indeed, it is somewhat anomalous that the Board is being asked to elaborate this important area of its mandate to-day by way of an asserted right which, no matter what our ultimate decision, is clearly at the boundary of the statute.

30. A second reason the case is difficult stems from the relationship between collective bargaining and politics. The applicant asserts that the pamphlet focuses on workplace concerns and constitutes a method of communication between itself and its members. The respondent emphasizes that the pamphlet is authorized by the NDP and centers on issues relevant to a political election. The respondent therefore sees the complainant as asserting a political right because of its connection with the NDP whereas the complainant seeks to show the relationship between political issues and legitimate workplace concerns of trade unions and employers. In a mixed economy any attempted demarcation between collective bargaining and politics may lack economic reality and not sufficiently acknowledge the impact of governments on the workplace. See generally, Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism* (1981), 60 Texas L.Rev.1. This may be particularly true in the context of public sector labour relations or major government initiatives into the workplace such as wage and price controls. Learned commentators have also observed that history proves trade unions cannot afford *not* to be politically active. See Woll, *Unions in Politics: A Study in Law and Workers' Needs* (1961), 34 So.Cal.L.Rev. 130 at 149; Horowitz, *Canadian Labour in Politics* (1968). And see Comment, *The Regulation of Union Political Activity: Majority Rights and Remedies* (1977), 126 U.Penn.L.Rev. 386 at 389. On the other hand, there are clear institutional differences between collective bargaining activity and political action. Whatever the general economic relationship of these two processes, the principal institutions operate at different levels and are distinct. Indeed, the complainant's own explanatory pamphlet for on-the-job canvasses acknowledges this labour relations reality by distinguishing between canvasses "on bargaining", "on workplace issues" and "on political issues".

31. The *Labour Relations Act* is part and parcel of this legal and institutional view of labour relations as a workplace phenomenon centering on the relationship between employers and employees although the voting patterns of employees may suggest that the demarcation between workplace and political concerns is more than just an institutional or legal phenomenon. See Horowitz, *supra*. Thus, while collective bargaining may reside in a sea of economic uncertainty and many trade unions may have long foregone operating exclusively under the ethos of business trade unionism, one finds little or no acknowledgement of these matters in the provisions of the Act.

We must remember that the *Labour Relations Act* did not create trade unions, they were in existence long before its enactment. It rather supports and regulates the collective bargaining process, only one of the many legitimate activities of trade unions. Some indication of this limited theme of the Act is found in sections 11 and 71 which make specific reference only to the traditional organizing activity of trade unions on an employer's property. A reading of any of the other provisions of the statute only serves to confirm that the statutory status of a trade union is as a bargaining agent for bargaining unit employees. From this perspective, it is far from self-evident that the political and social goals of a trade union, no matter how important or worthwhile constitute rights under the Act even where these goals, if achieved, could improve the lot of employees. Certainly it can be "argued" that the election of any political candidate may have an ultimate effect on employment conditions, but traditional electioneering is clearly removed from the central focus of the *Labour Relations Act*. Moreover, unlike most trade union activities, political canvassing is conduct engaged in by a great variety of institutions and persons not covered by the *Labour Relations Act*. The complainant is therefore seeking a right that others wishing to engage in the same activity cannot claim. This in itself is reason for caution.

32. As an aside, it is also interesting to note section 13.01 of both collective agreements between the parties which read:

The Company will designate enclosed bulletin boards which may be used by the Union solely for the purpose of posting Union notices and official papers and will provide the Local Union President with a key to the bulletin boards. Such material will be posted only by officers of the Local Union, a copy of which will be provided to the personnel office prior to posting.

While this complainant claims a statutory right to communicate to its members on company premises over any matter it wishes, it has bargained a clause which requires it to submit all notices it wishes to post. Trade unions have historically bargained over various methods of workplace communication after certification and, in many instances, have acknowledge in collective agreements that the range of items to be communicated by a trade union as an institution on an employer's premises is not unlimited. This Board is usually encouraged to apply its "collective bargaining expertise" in resolving the issues before it. What then is the relevance of such labour relations community practices in this case?

33. A final troublesome aspect of the case is that the complainant's claimed right is easily confused with basic employee freedoms in the workplace and certain general notions of "industrial democracy". In a real sense it could be asked what employer interest is sufficient to impede the dissemination of ideas in the workplace. As the *Canadian General Electric* case extensively quoted from above makes clear, an employee's time when not working is his own. Notwithstanding that the employee takes his lunch or coffee break on company premises, an employer generally has no bona fide management interest in restricting conversation and association between employees. In the context of this case we would observe that political issues during a general election are going to be discussed informally by employees and with the protection of a "just cause" clause, cannot be disciplined for engaging in such discussions during breaks or

on other non-working occasions. The grievance arbitration process has enshrined in the arbitral jurisprudence under collective bargaining agreements certain fundamental tenets of industrial democracy and has thereby provided employees with a number of general rights or freedoms. See Adams, *Grievance Arbitration of Discharge Cases* (1978) Industrial Relations Centre, Queen's University. In fact, the complainant relied on a large number of such arbitration decisions. While the jurisdictions of arbitration boards and labour boards are in many ways complimentary, they are not the same. For example, an employee unfairly dismissed for other than anti-union reasons has no redress under the Act, but may be reinstated by an arbitration under the terms of a collective agreement. To say a certain course of conduct cannot be claimed as a statutory right enforceable by this Board, is not to say that a right to engage in the activity does not exist. It may well exist under a collective bargaining agreement. This Board has a responsibility to elaborate its mandate creatively and in tune with contemporary values. But it does not have an unfettered mandate under section 3 to decree a complete range of fundamental workplace rights and freedoms it thinks to be appropriate in a free and democratic society. The parties, arbitrators under the authority delegated to them by the parties, and legislatures bear the major burden of this general responsibility. The Board's mandate is constrained by the purpose of the Act and its continuing credibility with labour, management and the courts depends upon the Board's acknowledgement of this fact.

34. The complainant relied heavily on *Eastex v. N.L.R.B.* (1978), 98 LRRM 2717 (U.S.S.C.) where a trade union sought to distribute a news bulletin on company premises during non-working time dealing with (a) importance of attending union meetings; (b) a request that every member write to their state congressman and senator in protest of a "right to work" law being incorporated into the state constitution; and (c) criticism of President Nixon for vetoing an improvement to the Minimum Wage Law and closing with the observation that "as working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today". In writing the court's opinion, Mr. Justice Powell found the activity to be protected and wrote:

We also find no warrant for petitioner's view that employees lose their protection under the "mutual aid or protection" clause when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship. The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of ¶7 makes clear, to protect concerted activities for the somewhat broader purpose of "mutual aid or protection" as well as for the narrower purposes of "self-organization" and "collective bargaining". Thus, it has been held that the "mutual aid or protection" clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause. To hold that activity of this nature is entirely unprotected - irrespective of location or the means employed -

would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. As this could “frustrate the policy of the Act to protect the right of workers to act together to better their working conditions,” *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14, 50 LRRM 2235 (1962), we do not think that Congress could have intended the protection of ¶7 to be as narrow as petitioner insists.

It is true, of course, that some concerted activity bears a less immediate relationship to employees’ interests as employees than other such activity. We may assume that at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the “mutual aid or protection” clause. It is neither necessary nor appropriate, however for us to attempt to delineate precisely the boundaries of the “mutual aid or protection” clause. That task is for the Board to perform in the first instance as it considers the wide variety of cases that come before it. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798, 16 LRRM 620 (1945); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 77, 194, 8 LRRM 439 (1941). To decide this case, it is enough to determine whether the Board erred in holding that distribution of the second and third sections of the newsletter is for the purpose of “mutual aid or protection”.

While many of the observations in this passage may be relevant to this jurisdiction, it is important to note that the N.L.R.B. found that the issue of union security was central to union strength and solidarity as well as being a mandatory subject of bargaining and that while the employer’s employees received well over the minimum wage proposed in the pending Minimum Wage Bill, any minimum wage inevitably influenced wage levels derived from collective bargaining, even those far from the minimum. The Supreme Court held that these findings were within the range of the Board’s discretion and went on to specifically find that all three sections of the letter constituted protected activity under the “mutual aid or protection” clause of section 7. But in a footnote to that conclusion, the Court had the following to say about “purely political matters”:

Petitioner argues that the “right to work” and minimum wage issues are “political”, and that advancing a union’s political views is not protected by section 7. As almost every issue can be viewed by some as political, the clear purpose of the “mutual aid or protection” clause would be frustrated if the mere characterization of conduct or speech removed it from the protection of the Act. See cases cited in N.16 *supra*. Moreover, what may be viewed as political in one context can be viewed quite differently in another. *There may well be types of conduct or speech that are purely political or so remotely connected to the concerns of employees as employees has to be beyond the protection of the clause.* But this is a determination that should be left for a case by case consideration. Compare cases cited in N.18, *supra*.

[our emphasis]

35. Two of the cases cited in footnote 18 are *Ford Motor Company* (1975), 221 NLRB 663; and *Ford Motor Company (Roughe Complex)* (1977), 233 NLRB No. 102. In the first *Ford Motor Company* case the Board was confronted with a newsletter published by a group within the U.A.S. not representative of its officials and which attacked the policies of labour unions to endorse candidates from either the Democratic or Republican parties and favoured the establishment of the Independent Party of Labor. References were made to Watergate, the coverup, inflation and recession. The Board affirmed an administrative law judge ruling that the newsletter was "a purely political tract exhorting employees not to support the traditional parties and their candidates in the 1974 congressional elections but to seek an independent workers' party" and that the newsletter was "wholly political propaganda which [did] not relate to employees' problems and concerns qua employees". The administrative law judge went on to hold:

While it may be argued that the election of any political candidate may have an ultimate effect on employment conditions, I believe that to be sufficiently removed so as to warrant an employer to prohibit distribution on its property of material solely concerned with a political election. Accordingly, I find the November 4th newsletter not to be protected and respondent's denial of permission to distribute it not violative of the Act.

In the second *Ford Motor* case the general counsel conceded that distributions on the employer's premises of literature urging participation in revolutionary communist party celebration and of the party's newspapers were unprotected. Similarly in *Auto Workers, Local 174 v. NLRB* (1981), 106 LRRM 2561 the District of Columbia U.S. Court of Appeals affirmed a labour board order refusing to allow union members to distribute during non-working time in non-working areas a plant leaflet that was entitled "Protect your hard-won collective bargaining gains - VOTE on Tuesday, November 7" and that featured union-endorsed candidates for Governor, U.S. Senator, and Justices of the Michigan Supreme Court.

36. It can be argued that engaging in this type of regulation is unwise because of the absence of meaningful and precise standards. As the United States Supreme Court acknowledge, the term "political" is capable of describing almost any issue or speech. This Board too accepts the problematic nature of drawing lines in these kinds of cases but, as in other areas of the statute, regulatory difficulties are no justification for no regulation. Administrative agencies were established to deal creatively and sensitively with just such problems. We are of the view that limitations in this area are contemplated given the dominant purpose of the statute and that such limitations can be administered by this Board without contributing to industrial relations conflict.

37. The material in the instant case is clearly not as telescoped on workplace problems as in *Eastex*. The complainant sought to distribute the pamphlet in the context of a federal political election. The pamphlet, on its face, has the approval of the NDP and its distribution was part of a joint action program involving that political party and its trade union affiliates. One sees the claim in the information pamphlet describing the canvass that a similar on-the-job canvass was important in defeating a right-wing conservative government. The pamphlet contrasts statements made by representatives

of each of the federal political parties on the general political and economic issues of employment levels, interest rates and fuel costs. This pamphlet itself makes a distinction between canvasses “on workplace issues” and those “on political issues”. On considering the material as a whole, we have come to the conclusion that in the circumstances of this case the activity is too remotely connected to the dominant purpose of the *Labour Relations Act* to attract the right asserted by the complainant. In our view, the communications in issue before us are not as connected to concerns of the bargaining unit employees as employees as they are to their concerns as voters. The complainant is therefore not communicating to bargaining unit employees primarily because of its status as their exclusive bargaining representative but rather as an affiliate or supporter of a political party seeking the electoral support of certain employees. In this context, the trade union canvasser is no different than any other political canvasser. A trade union should not be able to use its certified bargaining agent status to capture an audience for its political canvassing activities.

38. This conclusion, of course, does not bear on the issue of whether or not an arbitrator would uphold discipline issued to employees who engaged in the activity contrary to the respondent’s direction. At least one arbitrator has held that an employer violated a collective agreement by interfering with the distribution of pamphlets in circumstances similar to the instant case and nothing we have said should be taken as disagreeing with that result. See *Re Air Canada and Canadian Airline Employees*, *supra*. Our decision only reflects the acknowledged difference in jurisdiction between labour boards and arbitration boards.

39. Finally, this decision should not be taken by the labour relations community as licensing the primary censoring of trade union communication with bargaining unit members in the workplace. The pamphlet in question, in context and content, has not triggered the right asserted. Specific and contested government workplace initiatives may justify a different response. Moreover, primarily collective bargaining oriented communications containing other miscellaneous information or comment may be subject to different considerations. While this case makes it clear we are not going to permit an abuse of rights under the Act, we are not signalling an era of refined regulation of workplace communication by either this Board of employers.

40. This complaint is dismissed.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. I agree with Chairman Adams in the disposition of this case, but not with all his reasoning for so doing. It seems to me that the Board is being unduly restrictive on the response employers may take when faced with organized political campaigning on their premises.

2. There are three factual aspects of this case that require emphasis:

A. The union is clearly acting as the affiliate or agent of a registered political party in seeking to distribute literature and conduct a canvass of employees on the employer’s premises;

B. The employer has banned all political campaigning on its premises by anyone. If that is censorship within the dictionary definition of the word, then the employer is also restricting its own rights; and

C. There is no doubt that the union views the employees at the workplace as a captive audience for its purposes here. We were advised at the hearing of the poor attendance at union meetings.

3. With respect to future cases arising out of political issue campaigning (as compared to political party campaigning) it seems to me to remain open for employer argument that:

(a) organized political issue campaigning is disruptive *per se*; and

(b) the parameters of employer interest or rights deserving protection extend beyond the boundaries set up in *Re Canadian General Electric Company Limited (Peterborough)*, *supra*, when political issue campaigning takes place. The ideology behind the issue cannot be ignored when the extent of employer interest is being considered.

DECISION OF BOARD MEMBER H. KOBRYN;

I cannot agree with the narrow view taken by the majority of this Board in regards to the literature herein complained of for the following reasons:

1. The substance of the respondent's argument is that the *Labour Relations Act* has been established to regulate collective bargaining relationships between trade unions and employers. Implicit in the Act, counsel contends, is that trade union activity protected by the legislation consists of the pursuit of collective bargaining objectives, and the solicitation of union membership. For this submission, reliance is placed on the wording of sections 64, 66 70, 11 and 71. However, section 1(1)(p) defines a trade union as an organization for the purposes that *include* the regulation of relations between employees and employers and section 66 provides no specific protection to the collective bargaining activities of a trade union or the right of trade union members to engage in this process. To provide such protection the Act must be read as a whole and reliance placed on section 3 and the phrase "other rights under this Act" contained in the various sub-paragraphs of section 66. See *Jarvis v. Associated Medical Services*, *supra*; *Valdi*, [1980] OLRB Rep. Aug. 1254 or thereabouts; *St. Catharines General Hospital*, [1982] OLRB Rep. Mar. 441. See also *C.P.R. v. Zambri* (1962), 62 CLLC ¶15,407 (S.C.C.). Such activity may also fall within the protection afforded by section 64 which is a more self-contained section. From this view then the phrase "exercising any other rights under this Act" found in section 66 has to be given a content over and above union membership or union solicitation. However, the respondent asserts that a proper construction of the legislation should limit the phrase to collective bargaining activities of a trade union. Such as the right to strike, picket, and the dissemination of information pertaining to collective bargaining and contract administration. The Act

provides an elaborate mechanism for controlling the collective bargaining process and it is a matter about which an employer has an obvious interest. This being so, encroachment on an employer's property rights to pursue such activities appears justifiable. In the instant case, however, the trade union seeks to distribute literature pertaining to a federal election over which the employer has no control and no interest qua his status as employer of the grievors. It is in this context that counsel for the respondent submits that political activity, while clearly a lawful activity of a trade union, should not be considered a protected activity within the meaning of the Act. The test then proposed by the respondent is whether or not the employer has a direct interest in the subject matter of activity for which protection is claimed.

2. If the test is to be whether or not the employer has an interest or a controlling say, it would mean that there is no statutory protection for union members who wish to campaign for union office; who assist in organizing another employer's employees; who may participate in a demonstration in support of another employer's employees; who might wish to distribute literature in support of another employer's employees; who engage in presentations to public bodies for change in workplace conditions in general and over which an employer may take exception; and who seek and publicly lobby for legislative change pertaining to the workplace. All of these actions are regularly engaged in by union members and have been held to be protected in the United States under the *National Labor Relations Act*. Section 7 of that statute provides:

Employees shall have the right to self-organization, to form, join, or assist labour organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

I am of the view that the combination of section 1(1)(p) and section 3 together with a common-sense understanding of labour relations really provide no lesser scope for protection. See *Jarvis v. Associated Medical Services*, *supra*. Depending on the circumstances, any of the above activities may be protected under this Act.

3. A very restrictive approach to the activity of trade unions under the Act is capable of producing intractable problems in the no-solicitation area. The Chairman has already observed that the workplace is the most effective forum for trade unions to communicate with their members and employees for this reason. It is a natural location for the distribution of trade union literature, newsletters and notices of interest to the bargaining unit. Many of the notices and much of the newsletters will deal with collective bargaining activity but aspects will almost certainly relate to social and political activities of trade unions aimed at improving the lot of employees without the assistance of their employers. Not to protect the dissemination of all such notices and literature would fail to recognize the full nature of trade unions and involve the Board and employers in the censoring of communication. It seems to me that this narrow approach to the Act is inconsistent with contemporary labour relations reality.

4. However, the literature in question is characterized by the respondent as purely political and of direct interest only to the New Democratic Party. The material was not part of a general newsletter and not aimed at specific workplace reforms.

Unfortunately, it is not an easy task to draw the line between protected activity and purely political action as *Eastex Inc. v. N.L.R.B.* (1978), 98 LRRM 2716 quoted in the Chairman's opinion shows.

5. In determining whether or not this Board should adopt a "purely political" test in determining the ambit of activity protected by the Act, it is difficult to ignore that trade unions in this country have a long history of political activity. Indeed, labour legislation is in part, a product of such activity and in Canada and the U.S. there have been specific attempts to regulate the scope of trade union political activity. See *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Limited* (1963), 41 D.L.R. (2d) p.1; *Pipefitters Local 562 v. U.S.* (1972), 80 LRRM 2733; *Machinists Assn. v. Street* (1961), 48 LRRM 2345 (USSC) all dealing with the utilization of trade union funds for political activity. See generally also G. Horowitz, *Canadian Labour and Politics* U. of Toronto Press, 1968; J. K. Wanczycki, *Union Dues and Political Contribution, Great Britain, United States and Canada - A Comparison* (1966) 21 Ind.Rel.Quat.Rev.143; McIntosh, *A Comparative Study of Legislative Control of Union Political Activity in England, United States and Canada with Final Emphasis on Public Sector Unions in Canada* (1976) Queen's Law Journal 58. Woll, in *Unions in Politics: A Study in Law and the Workers' Needs* (1961) 34 Southern California Law Rev. 130 at 149 writes:

The preceding historical sketch provides an empirical demonstration that political and legislative activity is an essential part of any realistic effort by workers to improve and maintain their bargaining position, and to secure an atmosphere favorable to their general economic and social advancement. Numerous disinterested labor economists stand ready to verify this conclusion.

Professor Lloyd G. Reynolds of Yale summed up the matter in this way:

It is often debated whether unions should "go into politics"; really, they have no choice in the matter. They are automatically in politics because they exist under a legal and political system which has been generally critical of union activities. The conspiracy suit and the injunction judge have been a problem for unions from earliest times. A minimum of political activity is essential in order that unions may be able to engage in collective bargaining on even terms.

In addition to emphasizing that labor cannot even engage effectively in collective bargaining without a certain amount of political action, Reynolds discusses two other practical reasons for labor political activity. First, certain objectives in which labor has an interest cannot be achieved at all through collective bargaining. These include public education, social insurance of various kinds, adequate housing and effective anti-depression measures. Secondly, certain objectives which might be achieved through collective bargaining can be achieved much faster through legislation. This

category embraces legislation covering minimum wages, maximum hours and the elimination of child labor. Reynolds assigns prime responsibility for the progress of social legislation to the "increasing political awareness of trade unions. At the same time, however, he concludes that the increase in the political influence of organized labor has been offset by a simultaneous increase in lobbying by groups directly opposed to labor. The net result is that the workers' political power "is still not very great" vis-a-vis other groups.

Two other scholars, Daugherty of Northwestern and Parrish of Illinois, give as the reason for unionists' interest in politics their recognition of "their inability to cope with anti-union employers on equal terms on the economic field, [and] . . . their inability to protect their members against the vicissitudes of depression," together with their discovery of "what a great difference a favorable government made in their fortunes."

Princeton economist Richard A. Lester even defines a labor union in political terms, stating that it is "a political organization representing the members' job interests and their viewpoints on political and social issues." He emphasizes that unions "perform educational functions and help to reconcile conflicts of interest," and so serve "a beneficial role in a democratic society."

6. Acknowledging that the debate concerning the appropriate role of labour unions in American politics has been marked by a high degree of emotionalism, the comment entitled *The Regulation of Union Political Activity: Majority and Minority Rights and Remedies* (1977), 126 University of Pennsylvania Law Rev. 386 at 389 goes on to observe:

When unions enter the political fray, their greatest asset is not the financial resources they command, but rather "the web of personal and institutional influences by which they are linked to large numbers of people in relationships of dependence and respect". Indeed, a reliance on economic force alone would place labor at a permanent disadvantage with respect to corporations, which generally have substantially greater financial resources.

7. It is also useful to note that Canadian arbitration decisions contain many related findings that union activity can include actions far outstripping the more immediate collective bargaining with employers. Cases have held that the distribution of a union newsletter on company premises describing the company pleading guilty to a charge of misleading advertising to be a permitted union activity within the collective agreement (see *Re Texpack Limited and Canadian Textile and Chemical Union*, *supra*); that an employee must be given a leave of absence to assume a full-time position with a union even though the principal purpose of the position was to assist in a "parallel campaign" endorsed by the CLC and CUPE and to coincide with the election campaign conducted by the national political parties (see *The Corporation of Borough of Etobicoke*, *supra*); that the distribution of New Democratic Party pamphlets on an

employer's premises to fellow employees constitutes "lawful activity on behalf of a union" within the meaning of a collective agreement (*Re Air Canada and Canadian Airline Employees*, *supra*); that a notice relating to a demonstration to be held on Parliament Hill in Ottawa protesting the Federal government's wage and price control legislation was properly placed on a company bulletin board provided to the union in that it was a matter "pertaining only to the union" (*Re Pembroke General Hospital*, unreported decision of J. F. W. Weatherill, dated November 1, 1976); and that a leave of absence to visit other locals of the same union in the United States who were on strike against the American parent constituted a leave "for the transaction of union business" within the meaning of the collective agreement (*Re Canadian Timken Limited*, an unreported decision of Professor Raynard, dated November 6, 1978). On the other hand, members of a union who requested a leave of absence to attend a protest march against the Federal government's anti-inflation program could not bring themselves within a leave provision provided for "union business" (see *Re Wheatly Manufacturing* (1975), 12 L.A.C. (2d) 251). Similarly, the denial for requests for leaves of absence for certain union members in order to attend a demonstration on a picket line at another company was upheld on the basis that the leaves did not relate to a direct relationship with "legitimate union business" within the meaning of the agreement (See *Re G.S.W. Limited*, an unreported decision of O. B. Shime, Q.C., dated April 25, 1979). See also *Inco Limited*, unreported decision of W. R. Martin, Q.C., dated January 15, 1980. Clearly arbitrators have made serious efforts to accommodate a full range of trade union interests and recognized the importance of the workplace in the pursuit of these objectives.

8. The issue of trade union political activity is therefore familiar to collective bargaining participants. Trade unions have historically pursued the interests of their members both across the bargaining table and in the political arena. For trade unions the political and collective bargaining processes are inter-related. Pressure can be taken off collective bargaining by legislative change and pressure can be imposed by it. In the pursuit of workplace improvements and the preservation of existing benefits political activity can assume an important role. Moreover, the distinction between lobbying for change or contesting specific laws and purely political activity during an election is difficult to make in Canada where organized labour is, to a vast degree, associated with one political party. I have, against the history of trade union political activity and its close relationship to workplace goals, come to the conclusion that the distribution of the literature in the circumstances of this case constitutes a lawful union activity within the meaning of section 3 and protected by the statute. The objects of the on-the-job canvass include the strengthening of communication within the union; the canvass was a joint endeavour on behalf of the complainant and the CLC; the union's constitution clearly envisages such activity; and the specific pamphlet makes prominent reference to the employee's perspective.

9. The question remains, however, whether the complainant is entitled to distribute the pamphlet in non-working areas of the respondent's property during non-working time. In effect, does the fact that the activity takes place on the respondent's property give rise to a countervailing interest that outweighs the section 3 rights in that location. It is my view that the finding that an activity falls within the meaning of section 3 entitled the employees to engage in that activity on company premises provided the activity is to be confined to non-working time and does not interfere with

bona fide management interests. In other words, the basic principles set out in paragraph 22 are to apply. The Board should be reluctant to establish classes of protected activities by employees on the understanding that less substantial of protected activities cannot encroach upon an employer's property rights without his consent. The approach would encourage a degree of censorship by employers in the workplace that would be inconsistent with harmonious labour relations and contemporary values.

10. Furthermore, the union's fear for the job security of its members as expressed in this literature was very real, same is confirmed by the various articles quoted below. The statement made by the Honourable Jean-Luc Pepin, a leading member of the present Federal Government was made on August 13, 1982 and quoted in the pamphlet. It is necessary to quote much more of the Article, to get its full implications. It was entitled "*Layoff a must for Canada to Beat Inflation, Pepin says*" by Bob Hepburn, Toronto Star, Ottawa -

Canadian companies will definitely have to lay-off workers in order to stay within the federal government's new 6 percent wage and price guidelines, Transport Minister Jean-Luc Pepin admitted yesterday.

"There is no doubt that to meet those objectives corporations will have to lay off people," Pepin said. Layoffs caused by Ottawa's new wage and price restraint program are "one way of increasing productivity, isn't it?" Pepin said.

"This is the way (companies) can stay at the 6 and 5," he said, referring to federal government's program of voluntary wage and price guidelines of 6 percent in next 12 months and 5 percent in the following year. Pepin made his comments while announcing that Canada's major airlines and railways will limit their price and wage increases to 6 and 5 percent for next two years.

Jobs eliminated

His announcement came just hours after Air Canada said it would eliminate about 2000 jobs in the next year and Canadian National said it would cut another 5000 jobs. CN already has eliminated 5000 jobs this year because of poor business conditions. More than 1.3 million Canadians already are unofficially out of work, with the unemployment rate standing at a staggering 11.8 percent, the highest level since the Depression.

This statement confirms what many in Labour have been saying that this present economic depression was well planned by the Government and its successful execution has exceeded their wildest expectations, in fact this depression is out of control. In our opinion the sole purpose of this well planned depression was to destroy the moral and confidence of the Canadian working people by instilling in their minds by this most drastic and uncontrollable action, that they could or will be the next group of employees to lose their jobs.

11. The next statement or article that confirms how successful this planned program is and that it is out of control, appeared in the *Toronto Globe and Mail* on October 15, 1982 under the title "*Permanent layoffs up 90% this year with plant closings*" by Tony Van Alphen.

"Labour Ministry statistics show that 25,745 workers were out of work, either laid-off permanently or for varying periods, in the first eight months of this year, compared with 9,362 in the same period last year and 22,241 for all of 1981.

Of those figures, the number of workers who lost their jobs permanently because of company closings jumped 90 percent – 6,667 workers in the first eight months of 1982, compared with 3,452 in the same period last year.

The Labour Minister and spokesmen for business and labour say the number of Ontario workers affected would be considerably higher if the Ministry included cuts from all companies with fewer than 50 employees."

"Employment and Immigration statistics show the number of layoffs has increased across Canada by about 195 percent in the first eight months of this year to 220,309 from 74,604 in the same 1981 period.

But a department official said the statistics are not complete since reporting by companies is not mandatory and some regions keep better records than others."

12. The next article that leaves no doubt about Government's policy on this subject matter appeared in the *Toronto Star* on November 8, 1982 under the title "*Liberals missed the point.*"

"For a governing party that is offering the public – by the finance minister's own calculations – 12 percent unemployment for at least another year, the federal Liberals were surprisingly complacent at their weekend policy convention.

There was no outcry for a fundamental change in economic policy, no serious questioning of Prime Minister Pierre Trudeau's leadership, no insistence on putting absolute priority on getting Canada's 1.3 million unemployed back to work.

That's hard to understand. If the Liberal Party's grass-roots weren't galvanized by the human misery that current policies are causing, one might at least have expected them to be preoccupied with the likely political consequences: High unemployment is historically an issue that defeats governments in this country. Considering the Liberals already dismal standing at the polls, it is difficult to see

how they can be hopeful of winning the next election – under Trudeau as any other leader – if the current mess is allowed to persist for another year. And yet the convention was illuminated by no sense of emergency.

Though this sidestepping of the most burning issue of the day casts a tinge of unreality over the whole proceedings, some other aspects of the convention were positive.”

13. Now, did the employees in this instance have any real fears about their job security? Well, there are two very interesting articles on this very subject matter that confirm that they had many reasons to fear for their jobs. The first of these Articles appeared in the Toronto Star as a special on September 17, 1982 under the title “*12,600 miners laid off 3 more months by Inco*”.

“Sudbury – Miner Don Curry and 12,600 other Inco workers got the bad news last night: They won’t be going back to work until Jan. 3.

“I haven’t worked in four months now and the prospect of not working for another four months is very disturbing to me,” said Curry, after Inco Ltd. announced it would be extending its summer shutdown, which began July 2, by three months. He and his fellow miners thought they would be back on the job by Oct. 3 after a long summer layoff and they sat in stunned disbelief as they heard the news from the mining giant.

Sudbury officials said news of Inco’s extended shutdown came as no surprise but added that there is an urgent need to diversify the city’s economy. “Frankly, it’s of no surprise based on the bad news on the metal markets generally that the company had to take these measures,” said Bob Bateman, president of the Sudbury and District Chamber of Commerce. . . . Last week Falconbridge Ltd., Sudbury’s second largest employer, said it plans to extend its 13 week summer shutdown by an additional 14 weeks. Approximately 4,000 workers are affected.

The extended shutdown came in the wake of massive layoffs announced earlier this summer by both Inco and Falconbridge. Last month Inco said it planned to layoff indefinitely about 1,050 hourly paid workers at its Sudbury operations this January and in June Falconbridge announced it will reduce its Sudbury workforce by almost 1,000 workers in January as well.”

The second article in this regard is titled: “*Schefferville: The death of a mining town*” Toronto Star, November 10, 1982 by Jennifer Robinson, although this article is a little later but the handwriting was already on the wall. A short quote from this article enlightens you as to what is happening to the workers dream of job security especially in the mining industry. Quoting from the Schefferville article in part:

"Dick MacDonald, who works in payroll at Iron Ore and is one of a handful of workers kept on, for now, has worked in Schefferville for 18 years. He will soon be added to the list of more than 70,000 mine employees in Canada who have been laid-off because of the recession."

14. The following article confirms that this planned depression or recession is out of control. This article appeared in the Toronto Star on November 10, 1982 under the title: *"CN President predicts disastrous loss"*

Montreal - "Canadian National Railways president Maurice Le Clair has reversed months of cautious optimism with the prediction of a "disastrous" year-end loss for the Crown owned Company.

"I think we will be showing a loss, a substantial loss, at the end of the year," he said at a news conference yesterday.

"It will be a lot more than we expected two months ago. I have no figures but it will be very high, disastrous."

15. There is no disagreement that high interest rates are one of the major causes of inflation. They drain everyone's ability to survive with its subsequent effect on the job market. High interest rates and high unemployment have eroded consumer confidence. Consumers have virtually stopped spending, this in turn effects the need for new jobs, in fact this has caused existing jobs to disappear at a most alarming rate as confirmed by the articles quoted above. High interest rates have caused high debt charges to most businesses which in turn affects their ability to expand their facilities if and when it is required. These same high interest rates equally affect the farmers where they cannot acquire the new equipment or replacement equipment needed.

16. These disastrous high interest rates have also come home to roost on the doorstep of the Federal Government, whose economic policies created this problem. When you consider the Government total revenue of \$68 billion this year the Federal Government will make interest payments of nearly \$17 billion. Financial experts declare that this is an excessively heavy debt burden. If a private firm had to pay out so large a fraction of its income on account of debt it would be grossly overloaded. The same, they say, is true of government. It has "no room for manoeuvre." The money left after making interest payments is barely enough to keep it going, leaving nothing for desirable new programs that could greatly benefit the country. When you add the fact that they also created the high unemployment and that out of the \$68 billion total revenue at least \$4 billion has to be paid out as Unemployment Insurance for the unemployed who account for 12.7 percent of the workforce. This \$4 billion does not include the Federal Government's share of welfare payments for those unemployed who have exhausted their unemployment insurance. Thus, leaving very little money if any for the creation of jobs. This point is borne out when the new Minister of Finance announced he has allocated a paltry \$½ billion for the creation of 60,000 temporary jobs.

17. As to the never-ending increase in fuel costs which have fueled inflation since 1973 when the international price was set arbitrarily, these increases affect each and

every individual directly and indirectly. Directly when he uses oil and gas, individually and indirectly when all industries pass on the costs of fuel to the consumer in the price they charge for the goods they produce.

18. The literature in question which is the subject matter of this case is not wholly political propaganda, which does not relate to employees' problems, concerns and fears. This literature deals primarily with job security and how political decisions by the Federal Government has affected their job security and job security of a million, three hundred thousand Canadians and in particular more than 70,000 mine employees. In essence, the union was telling its members through the pamphlet what a tremendous difference a favourable government could make in their fortunes which are directly related to their job security.

19. I therefore conclude we have jurisdiction to inquire into this matter and it should be rescheduled for a hearing on all outstanding issues.

0546-82-R United Rubber, Cork, Linoleum and Plastic Workers of America, Applicant, v. BF Goodrich Canada Inc., Respondent, v. Group of Employees, Objectors

Bargaining Unit – Parties having history of excluding quality assurance employees from production unit – Having community of interest with production unit – Board finding tag-end unit to production unit appropriate

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and Stewart Cooke.

APPEARANCES: *Stephen Krashinsky, Reginald Duguay, Kenneth Dawson and Robert Gicorrie for the applicant; D. N. Corbett, S. A. Underhill, S. Marsden and G. L. Schwindt for the respondent; Randy Dunn for the objectors.*

DECISION OF THE BOARD; December 29, 1982

1. This is an application for certification in which the Board appointed a Labour Relations Officer to assist it in its determination of an appropriate bargaining unit. The bargaining unit sought by the applicant is composed of the "quality assurance employees" of the respondent at its Tire Plant in Kitchener. That plant is made up of a large production area, adjacent to which is the Quality Assurance Test Centre, as well as a maintenance area (including the maintenance office), a fabric lab, and a main office, which is composed solely of persons whose function is related to the operation of the tire-production facility. The "quality assurance employees" at this plant form their own department in the respondent's organization ("Quality Assurance") and report to their own separate Manager. The great majority of the "quality assurance employees" have their centre of operation in the Test Centre adjacent to the plant floor, and, as will be discussed, spend varying portions of their work-day on the floor itself.

2. The respondent has a second plant in Kitchener which produces plastic and rubber products other than tires. The applicant has represented the "production" employees at that plant (now numbering 450) since 1940. The applicant, as well, has represented the production employees at the Tire Plant since its inception in 1962. There are now 685 employees in that production unit. As with the second plant, the quality assurance employees have always been excluded from the applicant's bargaining unit. The bargaining unit for the Tire Plant is described in the collective agreement as:

All hourly-rated and incentive employees of the company at its plant at 131 Goodrich Drive in the City of Kitchener, SAVE AND EXCEPT foremen, persons above the rank of foremen, watchmen, guards, production schedulers, office employees.

No evidence was before the Board as to the basis on which the quality assurance employees were excluded. Looking at the description of the bargaining unit, it appears that they were considered to fall within the general exclusion of "office employees". Notwithstanding that, the applicant takes the position that the quality assurance employees in fact constitute an appropriate tag-end to the *production* unit.

3. As a starting point, the Board notes that the parties at both plants, as indicated, have a long history of excluding quality assurance employees from the production unit, as if they were "office" rather than "production" employees, and this is a fact which must be considered. But the Board also recognizes that such historical developments on occasion are grounded more in chance than in fact; where, as here, the bargaining units were cast in the then-common terms of "hourly-rated employees", quality assurance employees may have been accepted as "office" simply because they were paid by the employer on a salaried basis at the time. In these circumstances, the Board could not find the history between the parties necessarily determinative of the issue, at least where an examination of the facts demonstrates clearly that the individuals in question, in spite of the bargaining history, maintain a community of interest with the "production" rather than an "office" bargaining unit.

4. This is the conclusion which the Board comes to in the present case. The facts, which will be developed *infra*, clearly establish an affinity or community of interest for the bulk of the quality assurance employees which lies with the plant and not the office. The quality assurance employees, however, are not the only groups presently excluded from the collective agreement, and the respondent's position is two-fold in that regard. First, the respondent argues that the most appropriate unit would be *all* of the remaining office, clerical and technical employees at this facility, of whom there are 55 to 58 in number. This number would include personnel, accounting, and other clerical staff who operate wholly within the confines of the Main Office. Alternatively, if the Board were to find that *some* of this group more properly belong in an office unit of their own, the respondent argues there are yet other "plant" clerical and technical personnel beyond the quality assurance employees who would properly be joined with the quality assurance employees in a tag-end to the production unit.

5. The Board finds no merit in the respondent's initial submission that all remaining office, clerical and technical employees at this location form a single appropriate unit which includes the quality assurance employees. In general terms,

quality assurance personnel may be found to have a community of interest with either the office or the plant, but the plant is more common (see *Aldon Inspection Limited*, [1973] OLRB Rep. Nov. 569; but cf. *Trane Canada*, [1967] OLRB Rep. Dec. 865; see also *Fabrican Mfg. Limited*, [1969] OLRB Rep. June 353; *Affiliated Medical Products*, [1969] OLRB Rep. Jan. 1014; *General Instrument of Canada*, [1966] OLRB Rep. June 204). In the present case, as noted earlier, the facts clearly support a finding that the community of interest of that group is with the plant and not the office. The quality assurance employees accordingly belong in a tag-end unit to the existing plant or production unit. The only question is what *other* employees not covered by the collective agreement should be included in that same tag-end unit to the plant. As the Board observed in *Cryovac*, [1981] OLRB Rep. Nov. 1574, at paragraph 4:

... In the case of an industrial establishment the bargaining unit which the Board normally finds to be appropriate is a unit of all plant or production employees. In the event that there are employees outside that unit, on a subsequent application for certification, the Board will normally require the trade union to bargain on behalf of all of the remaining plant employees in order to prevent the undue fragmentation of bargaining. This of course is referred to as a "tag end unit" and it would follow that there is only one tag end unit to a production unit.

Similarly, see *Canadian Industries Limited*, [1967] OLRB Rep. Feb. 882. And see generally, *Canadian General Electric*, [1979] OLRB Rep. Mar. 169.

6. The parties combined with the Board's officer, Mr. Wilson, to produce an agreed statement which sets out in an accurate and succinct way the facts upon which the Board is to rely in this case, and which also avoided the costly and time-consuming process of examining witnesses. The statement contains the following description of functions of the additional employees whom the respondent submits should be added to any tag-end to the production unit:

Employees Reporting to Production Superintendent

31. The Two Standards & Methods Analysts: Job function is to determine incentive standards for the production employees. Approximately 20-25% of time spent on plant floor doing checks and monitoring performance levels. Balance of time is spent in main office. Prior to becoming a Standards & Methods Analyst, one was a quality assurance employee and one was an hourly production employee.

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33. The Two Time Checkers: Job function is checking production time sheets and application of incentive standards. Approximately 5% of time is spent on plant floor. Balance of time is spent in main office.

34. The Six Schedulers: Job function is to schedule use of machinery, production and manpower. This involves taking inventory counts of materials located on the Tire Plant floor and preparing machine orders. Approximately 20 to 25% of time is spent on plant floor. Balance of time is spent in the main office.

Employees Reporting to Manager Tire Construction

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36. (a) The Seven Construction Technicians: Job function is monitoring and maintaining quality product level of tire construction. This involves the monitoring of machines, the physical inspection of defective tires and the evaluation and review of data collected by the quality assurance employees. Somewhat higher level of responsibility than quality assurance employees. Skills and training differ from quality assurance employees in that the Construction Technician has more experience at the Tire Plant. Senior quality assurance employees serve as the base from which most Construction Technicians come. The rate of pay on transfer from quality assurance to Construction Technician are equivalent. On average, based on length of service, the Construction Technician earns more than the quality assurance employees. Approximately 50% of the Construction Technician's time is spent on the plant floor. The balance of time is spent in the main office. The Construction Technicians have desks in the main office. One Construction Technician spends 90% of his time on the plant floor. However, unlike the quality assurance inspectors who have scheduled rounds, the Construction Technicians do not have scheduled rounds.

(b) One Construction Technician leaves the Tire Plant from time to time in the course of his employment.

(c) Six of the seven Construction Technicians have attended a one week orientation session in Akron, Ohio, which included attending seminars, to familiarize the Technicians with those in Akron that they deal with from time to time. Quality assurance employees and most other salaried employees have not attended these seminars.

(d) Construction Technicians, as noted in (a) above, have a higher level of responsibility. This involves having a wider margin in which to decide whether a product is suitable. This allows Construction Technicians to overrule decisions of quality assurance inspectors in regards to the use of materials.

Employees Reporting To Manager Compounding

38. Technician: Job function is monitoring and maintaining compound aspects of tires. This involves the monitoring of ma-

chines, presses, the physical inspection of defective tires, monitoring cure rates and maintaining cure records. Approximately 40% of time is spent on Tire Plant floor. Balance of time is spent in main office where he has a desk.

39. Fabric Tester: Testing of fabric to ensure that fabric meets predetermined standards. Time spent principally in fabric test centre. [The Board notes from the Floor Plan filed that the fabric test centre is located near the Main Office and at the opposite end of the building from the production floor.]

40. The Two Compound Technicians: Job function is monitoring and maintaining compound quality and factory waste. This involves the monitoring of machines, materials and the physical inspection of defective tires. Approximately 50% of time is spent on Tire Plant floor. Balance of time is spent in main office where they have desks.

Employees Reporting To Plant Engineer

41. The employees described in paragraphs 42 through 46, inclusive, are located in the main maintenance area which includes maintenance offices. With respect to these employees, the majority of their time is spent in the main maintenance office and some of their time is spent on the tire Plant floor.

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43. Senior Expediter: Job function is to expedite back orders with suppliers.

44. Maintenance Clerk Draftsman: Job function is to file and record blueprints, maintain equipment files.

45. Electronics Co-ordinator: Job function is monitoring of certain machines to reduce maintenance downtime and co-ordinator of maintenance program.

46. Project Co-ordinator: Job function is providing preventative maintenance program for building machine.

7. As can be seen, all of the above employees spend significant amounts of time outside of the Main Office area, either because their duties require them to leave their desks in the Main Office for varying amounts of time, or because they are permanently located in a separate area of the building, such as the Fabric Lab or the Maintenance area. There is no interchange between these employees and the Quality Assurance employees. The respondent does, however, highlight in its submissions the natural progression of skills such as from Quality Assurance Inspector to Construction Technician, as well as the respondent's cross-training program, which is described in the agreed statement as follows:

28. In the past 18 months, 3 quality assurance employees have been cross-trained to perform the job functions of other salaried employees at the Tire Plant. This is pursuant to a development program of the respondent. The cross-training involved:

- (i) one quality assurance employee was trained as a Standards & Methods Analyst;
- (ii) one quality assurance employee was trained as a Scheduler; and,
- (iii) one quality assurance employee was trained as a Construction Technician.

In addition, 18 months ago, a production employee was cross-trained in quality assurance [quality assurance employees are generally hired from the bargaining unit].

The respondent points further to the fact that all of the individuals it seeks to include perform functions which are directly related to the production process, and that many of them are in fact a part of the respondent's overall quality-control program.

8. The number of quality assurance employees whom the applicant seeks to represent is 20. An additional 3 quality control shift-supervisors are in dispute, being said by the respondent to be non-managerial and properly included in the applicant's bargaining unit in any event. The functions of the 20 quality assurance employees not in dispute are described in the agreed statement as follows:

Nature of Work Performed by Quality Assurance Employees

12. (a) A description of the work performed by the 12 quality assurance inspectors under the "Group Supervisor" is as follows:

To inspect and record the quality of the product and the reliability of the machinery producing the product.

Any part of the product to be found not up to standards and within tolerances is to be held by the Q.A. inspector for disposition. The determination of the disposition may require further follow-up construction or compounding personnel.

Any of the machinery found not to be producing reliably and up to standards and within tolerances is to be shutdown by the Q.A. inspector until repaired by Maintenance personnel. Then it is rechecked by the Q.A. inspector and the shut down tag is removed by the Q.A. inspector if repaired up to standards and within tolerances. If it is still not within these standards and tolerances, it remains shut down. The tags to shut down machines may be overruled by the Manager of Q.A. or the

Group Supervisor or the Shift Supervisors. The department foreman is the person that contacts maintenance if a machine is shut down.

The machines that are checked by Q.A. personnel are operated by bargaining unit employees. During a machine check the bargaining unit person running the machine being checked by a Q.A. inspector works with the Q.A. inspector. During this check, the Q.A. employee receives the full cooperation of, and works together with, the bargaining unit employee. During this check the bargaining unit employee moves the product in relation to his machine while the Q.A. employee checks and records related data. If a problem is discovered by the Q.A. inspector during a check, some inspectors may call the construction personnel, compounding personnel and/or the Q.A. Manager or Group Supervisor or the Shift Supervisors, if available, for his decision on whether to hold for further follow-up or release of the product. This procedure is open to all Q.A. personnel and it is up to his individual discretion whether he will do this or not.

(b) On occasion the inspectors may be reassigned to perform some of the duties described in paragraph 13 (when a test centre inspector is absent).

(c) The vast majority of time of these inspectors is spent on the Tire Plant floor performing the quality assurance functions.

13. A description of the work performed by the 6 quality assurance inspectors under the "Supervisor Test Centre" is as follows:

- (a) The functions of the 6 test centre inspectors are to select representative samples from production and, in accordance with procedures, conduct and document the results of all tests and/or inspections. For example, tests with respect to physical dimensions, branding, static and dynamic.
- (b) The vast majority of time is spent in the test centre performing these tests. On occasion, the test centre inspector may be reassigned to perform some of the duties described in paragraph 12 (when a floor quality assurance inspector is absent).

14. A description of the work performed by the Quality Assurance Technician is as follows:

Review and process newly released standard practices and technical guidelines and to evaluate related production processes to initiate quality assurance procedures. In addition, to

tally and analyze quality assurance inspection data to highlight problem areas to resolve quality/waste problems. This includes certain quality assurance tests performed in the plant which comprise 50% of his time. The other 50% of his time is spent in the main office where he has a desk.

15. A description of the work performed by the Quality Assurance X-Ray Technician is as follows:

For approximately 50% of his time to conduct X-ray inspection programs which involves the operation of the X-ray machine located in the quality assurance test centre. The other 50% of his time is spent analyzing, reporting of field returns and in initiating corrective action. He provides support and assistance to the production and technical departments in the evaluation of problems to ensure quality. Approximately 25% of his time is spent in the main office where he has a desk. On infrequent occasions, he may be reassigned to perform some of the duties described in paragraphs 12 and 13.

9. The agreed statement in addition sets out the following comparison of conditions of employment:

Comparison of Conditions of Employment of Quality Assurance Employees with Other Employees located at the Tire Plant

16. Wages: The quality assurance employees are salaried employees and are paid every two weeks. The same conditions prevail for the remaining salaried employees proposed by the respondent as an appropriate bargaining unit at the Tire Plant. Neither the quality assurance employees nor any of the remaining salaried employees proposed by the respondent as an appropriate bargaining unit punch a time clock.

The hourly-rated production and incentive employees are paid weekly. The hourly-rated production and incentive employees punch a time clock.

17. Hours of Work: (a) The quality assurance employees work shift work (three shifts) and work hours similar to and in conjunction with the production employees who also work shift work (the Tire Plant operation requires that when production is on shift, Q.A. employees production is on shift, Q.A. employees are also required).

(b) The shift hours are: 7:45 a.m. to 3:45 p.m.; 3:45 p.m. to 11:45 p.m.; 11:45 p.m. to 7:45 a.m.

(c) The exceptions to subparagraph one of paragraph 17 are as follows. Neither the Quality Assurance Technician nor the Quality Assurance X-Ray Technician work shift work. With respect to those quality assurance employees who work in the Test Centre, work is performed on approximately 20 weekends per year. This weekend work is not geared to the production schedule. In addition, work on weekends is occasionally required for production employees. When such work is required by production employees, quality assurance employees may not be required in the Test Centre. However, quality assurance employees are usually required to work on the floor with production employees when production is scheduled.

(d) All of the other salaried employees proposed by the respondent as an appropriate bargaining unit do not work shift work. They work daily hours of 8:00 a.m. to 4:00 p.m.; these are the hours worked by the Quality Assurance Technician and the Quality Assurance X-Ray Technician.

(e) Foremen work three shifts and nurses work two shifts. The foremen and the nurses are salaried employees. There are some foremen who work straight days.

(f) The quality assurance employees, the foremen and the nurses work a regular 40-hour week with a daily paid lunch period. The production workers work a regular 40-hour week with a daily paid lunch period. The other salaried employees (including the Quality Assurance Technician and the Quality Assurance X-Ray Technician) work a regular 37½ hour work week with an unpaid daily 30-minute lunch period.

18. Shift Premiums: Employees who work shift work receive a shift premium. Accordingly, quality assurance employees, along with foremen, nurses and bargaining unit employees, receive a shift premium. The shift premium depends upon the shift worked and is the same for each employee. All of the other salaried employees proposed by the respondent to be included in the respondent's proposed bargaining unit do not receive shift premiums because they do not work shifts.

19. (a) Clothing: There is an established practice within the plant that those persons working around the machinery do not wear ties for safety reasons. The quality assurance employees and the production employees do not wear ties. The exception to this is that the Quality Assurance Technician does wear a tie. Foremen on the afternoon and night shifts do not wear ties. Some foremen on the day shift do not wear ties.

(b) The other salaried male employees proposed by the respondent as an appropriate bargaining unit do wear ties with the

exception of a Construction Technician and the Maintenance Clerk Draftsmen.

(c) There is an established practice within the plant that production employees may dress in any manner; for example, they may wear cut-offs and some do and some do not wear shirts.

(d) Quality assurance employees are required to wear shirts and long pants. In addition, the quality assurance employees generally wear smocks called shop coats. The Construction and Compounding Technicians, Schedulers and Standards and Methods Analysts usually wear shop coats when they spend time on the Tire Plant floor, but would not wear shop coats when they are briefly on the Tire Plant floor. A few production workers wear shop coats. Occasionally, a quality assurance employee assigned to the Test Centre is required to go in the "hotroom". During the brief period of time that the quality assurance employee is in the Hotroom he takes his shirt off.

20. Lockers and Showers: (a) Nineteen of the twenty quality assurance employees proposed by the applicant as appropriate for collective bargaining have lockers in the locker area. Lockers are used intermittently by some foremen, quality assurance employees and production employees. A Construction Technician and one Standards & Methods Analyst also have lockers.

(b) There is one shower facility at the plant and some quality assurance employees use this facility along with production workers and some foremen. Salaried employees other than the above-referred-to quality assurance employees and foremen do not shower at the Tire Plant.

21. Where Quality Assurance Employees Eat: The quality assurance employees eat their lunch in the quality assurance test centre office at the test centre desks. These quality assurance employees eat their lunch with other quality assurance employees. The exceptions to this are that 2 quality assurance employees regularly eat with production employees and the Quality Assurance Technician eats in the main office at his desk. All the other salaried employees proposed by the respondent as an appropriate bargaining unit eat at their desks in the main office (with the exception of those employees noted on page 7 of the Organizational Chart, who eat at their desks in the main maintenance area), and do not eat with the quality assurance employees or with the production employees.

22. (a) Social Clubs and Activities: There is a Salaried Employees' Club which holds three or four social functions during the year. All salaried employees (including quality assurance employees) are

entitled to participate in its functions. Production employees are not entitled to participate in these functions.

(b) An annual Christmas party is held for the salaried employees (including quality assurance employees). Several years ago the date for the party was changed to Saturday night to allow all salaried employees, including those who work shift work, the opportunity to attend the party.

23. BF Goodrich Telephone Book: All salaried employees (including the quality assurance employees) are listed in the respondent's internal telephone book. No production employees are listed in this telephone book.

24. The quality assurance employees, with the exception of the 3 Shift Supervisors and the X-ray Technician, do not wear pagers. Production employees do not wear pagers. Foremen wear pagers, as do some of the other salaried employees proposed by the respondent as an appropriate bargaining unit, including some of the Construction Technicians, some of the Compounding Technicians, and some of the Schedulers.

25. Task Forces: It is the practice of the respondent to constitute Task Forces of employees to examine particular work-related problems. Salaried employees and production employees who do not work shift work have been participants in Task Forces. Accordingly, none of the quality assurance employees or foremen who work shift work serve on these Task Forces, while some of the other salaried employees proposed by the respondent as an appropriate bargaining unit do serve on the Task Forces. Clericals and time checkers do not serve on the Task Forces. Compounding and Construction Technicians serve on the Task Forces.

26. (a) All of the salaried employees (including the quality assurance employees) at the Tire Plant enjoy the same benefits. These benefits differ from those provided to the production employees.

(b) There are a number of benefits which are provided to production and salaried employees which are similar. However, certain of these benefits are more beneficial to the salaried employees:

- (i) different life insurance coverage;
- (ii) different illness absence program;
- (iii) different long term disability program;

- (iv) different pension plan;
- (v) different leave of absence program.

(c) There are a number of benefits which salaried employees are entitled to participate in which production employees are not:

- (i) voluntary accident insurance;
- (ii) stock purchase plan and retirement savings plan;
- (iii) "Y" membership program.

10. On the basis of the foregoing, it is the Board's conclusion that none of the other employees raised by the respondent ought to be included within the tag-end to the production unit. It is true that their various functions relate directly to the production facility, and that many of them are involved at one level or another in the overall quality-control process of the facility. But beyond that general statement, an examination must be made of their actual work functions and conditions of employment in order to arrive at an overall characterization of them as "plant" or "office" within this operating facility. In the board's view, none of these others share the kind of close community of interest and integration of work function with the production workers which the quality assurance employees demonstrate. Summarizing the statement of facts, eighteen of the twenty quality assurance employees have their permanent centre of operation in the lab adjacent to the plant area, and are scheduled to work shifts to correspond with the needs of the general production complement. This latter, the Board finds, is no matter of happenstance, but rather is reflective of the high degree of functional interdependence of the two groups. The majority of the quality assurance employees (i.e., the 12 "inspectors") in fact appear to perform their function hand in hand with the operators, while production is running. Of the remaining quality assurance all but the Technician interchange in their duties with the inspectors. In contrast, none of the other salaried employees proposed for inclusion work shifts; rather, all work the normal office hours of 8 a.m. to 4 p.m. The 18 quality assurance employees work a 40-hour week, with a paid lunch period, the same as production workers. The other employees proposed work a 37½-hour week, with an unpaid 30-minute lunch period, the same as the main office.

11. Again like the production workers, the 18 quality assurance inspectors, plus the quality assurance X-ray technician, do not wear ties. This is significant only in light of existing safety practices, and again is reflective of regular exposure to plant machinery when it is being run. Of the others proposed for inclusion, only one Construction Technician and the Maintenance Clerk Draftsmen choose not to wear ties. Quality assurance employees, shop foremen and production workers also tend to use the lockers and showers located at the plant, while the others generally do not. Once again this would appear to be reflective of a similarity in working conditions, in terms of close and regular exposure to the plant and its machinery, while product is actually being run. The quality assurance employees except the quality assurance technician eat their lunch at the desks of the quality assurance test centre located in the plant. The only other exception is that two of the quality assurance employees actually eat with the

production employees in their cafeteria. All other salaried personnel eat at their own desks, either in the main office, the fabric test centre, or the main maintenance area.

12. There is no question that the work of, in particular, the construction and the compounding technicians, forms a part of the respondent's overall quality control program. But the respondent itself has not regarded these groups as a single homogeneous whole; each group is organized in the respondent's plant as a separate department with its own Manager reporting directly to the Plant Manager. And while each of these groups of technicians demonstrate a substantial exposure to the plant floor, the differences in work characteristics (and the hours of work in particular) satisfy the Board that the "quality assurance" department functions essentially as part of the production unit, while the remainder function essentially as part of the office. It should be noted that the Board is not being forced to choose here between the creation of one or two "tag-end" units (i.e., one for the plant and one for the office); there *is* no office unit at this point. The Board in this regard notes the concession of the applicant that all of the remaining office, clerical and technical employees might well form an appropriate unit. Having had the evidence with respect to these remaining employees before it, the Board would be hard-pressed to find that any other (narrower) unit would be appropriate.

13. With respect to the present application, the Board finds that the applicant's organization of a separate, self-contained unit of quality assurance employees as a tag-end to the plant is consistent with the respondent's existing organizational structure, and will not create any undue hardship to the respondent in the way it has been carrying on its business. The creation of a bargaining unit does not normally interfere with job promotion out of that unit, and the existing inter-job training does not appear to be on a scale which will be significantly affected by this certification. The Board is mindful of the principles set forth in *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, with respect to the appropriateness of a bargaining unit, and for all of the reasons given can find in this case no basis for requiring the applicant to expand beyond the quality-assurance unit which it has already organized.

14. The remaining question is where to place the quality assurance technician and X-ray technician, in light of the difference which exist between them and the 18 quality assurance inspectors. These two, for example, have their desks located in the main office, and are scheduled to work only days in the same way as other members of the office staff. It is notable that the X-ray technician, however, in spite of this, eats his lunch not at his desk in the main office but with the other quality assurance employees in the test centre (where he spends 50 per cent of his work time). He also is called upon to interchange with other quality assurance employees from time to time, and, like the others, does not wear a tie in his work. The quality assurance technician, on the other hand, appears by and large indistinguishable from other employees working out of the main office, and had the question been argued, the Board might well have included this one quality assurance employee in an "office" unit rather than a tag-end to the plant. But no one suggested that, and this may reflect the parties' sense of a functional cohesiveness between this individual and the other quality assurance staff, as well, of course, as the common reporting line. The Board accordingly will not exclude the quality assurance technician from the unit which it otherwise finds to be appropriate for collective bargaining.

15. The Board finds all employees of the respondent at its plant at 131 Goodrich Drive in the City of Kitchener, save and except foremen, persons above the rank of foreman, watchmen, guards, office employees, and persons covered by a subsisting collective agreement, to be a unit appropriate for collective bargaining. The Board notes by way of clarity that the term "office employees", as used in the Board's description, excludes the quality assurance employees but includes all other office, clerical and technical employees not covered by the existing collective agreement (including "production schedulers").

16. The Board notes finally the position of Mr. Randy Dunn, spokesman for the objecting employees, that the applicant's bargaining unit is too weak by itself for meaningful collective bargaining. The applicant in this regard has advised the Board that it intends to seek from the respondent the amalgamation of its proposed unit with the production unit which it already represents. As the *Labour Relations Act* is presently structured, the Board would only note that this is a matter dependent entirely on the mutual agreement of the parties. As the applicant has satisfied the Board that its unit is the appropriate tag-end to the plant, however, no basis exists for the Board to do other than proceed with the application and ascertain the applicant's level of membership support in that unit.

17. There were either 20 or 23 employees in the bargaining unit on the date that this application was made. The applicant has submitted cards on behalf of 15 of them. Also received before the terminal date was a statement in opposition to the application signed by 5 employees in the unit. However, only one of the employees signing this statement also signed a card for the applicant. Even if the Board were to discount that one membership card, the applicant still would have enough unequivocal evidence of membership support to entitle it to certification without a vote. This is true irrespective of the final determination of the status of the 3 shift supervisors in dispute.

18. Accordingly, the Board exercises its discretion pursuant to section 6(2) of the *Labour Relations Act* to certify the applicant on an interim basis as exclusive bargaining agent for all employees of the respondent at its plant at 131 Goodrich Drive in the City of Kitchener, save and except foremen, persons above the rank of foreman, watchmen, guards, office employees, and persons covered by a subsisting collective agreement, and, pending a resolution of their status, excluding as well the quality assurance shift supervisors.

19. A formal certificate must await the final resolution of the composition of the bargaining unit. The date for filing representations with respect to the Officer's report is hereby extended from November 16, 1982 to January 12, 1983.

1502-82-M Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, Applicant, v. **Bot Construction (Canada) Limited**, Respondent

Construction Industry Grievance – Practice and Procedure – Parties settling union grievance on employer undertaking to apply collective agreement – Subsequent individual grievances filed claiming lost wages – Whether grievances precluded by prior settlement

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members H. Kobryn and J. Wilson.

APPEARANCES: *B. W. Adams, C. LaCombe and L. Thibault for the applicant; D. Jane Forbes-Roberts for the respondent.*

DECISION OF THE BOARD; December 3, 1982

1. This is a referral under section 124 of the *Labour Relations Act* in which the union claims that the respondent Bot Construction (Canada) Limited (“Bot”) has failed to comply with the terms of a collective agreement by which it is bound. In order to appreciate the context in which this application arises, and the respondent’s objections to it, it is necessary to refer briefly to an earlier section 124 application between the same parties (Board File No. 1007-82-M).

2. Bot is bound by a collective agreement with the applicant union which applies to all truck drivers “within a radius of thirty-five miles from the City of Sudbury Federal Building”. At or about the beginning of August, 1982, Bot became involved in a road building project on the Killarney access road off Highway 69. At the time, a number of its truck drivers were on layoff. These employees complained to their trade union that the Killarney site was within the geographic scope of the collective agreement and that consequently, they should be recalled to replace any non-union drivers then engaged on the project. This complaint was investigated by Charles LaCombe, the union business agent, and eventually resulted in a grievance dated August 11, 1982. The portion of the grievance form entitled “Details of Grievance” reads as follows:

The Union is grieving that the company is failing to comply with the Sudbury Area Collective Agreement dated May 14, 1982. Specifically Article 2, Coverage 2.1 and 2.2, this job is within the 35 mile radius as described in the Agreement and also on the certificate of Certification issued July 24, 1973.

To this the company replied:

We are disputing your grievance dated August 11, 1982 on the grounds that we have checked the distance of our work location on Highway #637 and it is a distance of 41 miles which is outside the territory covered by the existing agreement.

3. The company took the position that the scope of the collective agreement was limited to projects within thirty-five miles *by road* from the Sudbury City Centre. The Killarney project was beyond this limit. The trade union took the position that the distance from the City Centre to the Killarney job site should be measured "as the crow flies". From that perspective, the project was within a "radius of thirty-five miles" from Sudbury – even though truck drivers (unlike crows) might well have to travel much farther than that to get there. As those who are familiar with the terrain in the Sudbury basin will know, the travelling crow will often have this kind of advantage.

4. Efforts to resolve the parties' differences were pursued both before and after the reference of the grievance to the Board, and eventually culminated in a discussion between LaCombe and William McInnes, a company official. Both were anxious to resolve the matter without litigation. McInnes would shortly be leaving the company's employ and LaCombe was scheduled to go on vacation the following day.

5. The evidence respecting that conversation is not substantially in dispute. It was McInnes who initiated the call, indicated his desire to get the problem resolved, and asked LaCombe what it would take to resolve it. LaCombe said he was concerned to get his members working. McInnes, in turn, suggested that the company would undertake to work under the agreement, and to treat the job as a "union" project if the union would withdraw the grievance. LaCombe agreed. The section 124 application was withdrawn the following day and the employer immediately began to contact employees to come to work. The withdrawal of the section 124 application is recorded in a decision of the Board dated September 2, 1982.

6. During this conversation there was no discussion of individual employee claims, the number of employees who might have been hired had the agreement applied from the beginning, or any monetary claims in respect of such individuals. LaCombe had the impression that in the initial weeks of the project, the company had had little need for his members, and had been meeting their requirements by owner-operators who would not be covered by the collective agreement in any event. McInnes testified that he could not recall any discussion of individual employee claims for back wages or any terms of settlement other than those referred to above. He told the Board that he didn't think that there were any. LaCombe confirms that there was not really any discussion, "as such", about such matters. He testified that the possibility of individual grievances may have been mentioned in passing, or in an "offhand" way, but it was not the principal focus of the conversation. He too could recall no discussion of possible wage claims.

7. Both McInnes and LaCombe considered the problem resolved when the company agreed to apply the collective agreement to the Killarney project. McInnes did not anticipate any further difficulties. Neither did LaCombe. LaCombe candidly advised the Board that he was surprised by a later employee grievance claiming compensation for lost wages in respect of the period between the commencement of the Killarney project and the time when the Teamster members were recalled. He thought the problem had been settled.

8. On October 2, 1982, a number of individuals filed a group grievance claiming lost wages in respect of the period between July 28, 1982 when the project started and

September 1st, 1982 when the company began to apply the collective agreement to the Killarney project. The company argues (*inter alia*) that the subject matter of this grievance is substantially the same as, or overlaps with, the subject matter of the grievance which was settled. The same parties are involved, the same employees are involved, the same time period is involved, and the allegation of non-compliance with the Sudbury area agreement is essentially the same. The company submits that the only difference here is that the claim is more specific – compensation – while, in the earlier case, the union sought compliance with the agreement in all its terms. The union argues that the two grievances are not the same although they relate to the same project. In the union's submission, the first grievance focused on the interpretation of the scope clause of the collective agreement, while here the question is the applicability of the other terms now that it is settled that the agreement does in fact apply. The union asserts that the earlier settlement only involved the interpretation of Article 2 of the collective agreement. It was not intended to be, and should not be construed as, any waiver of employee rights for the period before the company acknowledged that it was bound by the collective agreement. The union maintains that it is not attempting to "unravel" a settlement. The settlement of the August 11th grievance did not foreclose any other claims arising out of the company's failure to apply the collective agreement to the Killarney job prior to September 1, 1982.

9. We do not have the benefit of a written settlement of the earlier section 124 application. The parties did not reduce that settlement to writing. In consequence, we are left to weigh the evidence before us and make a reasonable assessment of what that settlement entailed, and whether it precludes the instant application.

10. We note first that both the employer and union representatives assumed that the problems concerning the application of the collective agreement to the Killarney site had been resolved. Neither anticipated any further grievances. Further, the language of the first grievance is very general in character. Had that matter not been settled and proceeded to arbitration, the union would undoubtedly have sought financial compensation for any employee losses occasioned by the company's failure to properly apply the terms of the collective agreement. And had the company, at that point, complained that the grievance was not very specific about the remedy requested, the Board would undoubtedly have held that the question of remedy, including compensation, was implicit in the general claim that the employer had not been complying with the terms of the agreement. By the same token, it is our view that the Board should be equally liberal in its construction of the parties' settlement – absent any written terms which would qualify or modify the ordinary inference arising from what the parties have done.

11. In the first grievance the union complained that the company was not applying the agreement to the Killarney site. The employer asked what it would take to resolve the grievance and the union replied that it was only necessary to recognize the Killarney project as a "union job" and hire union members. No claim was made for compensation. On that basis, the company acceded to the union's request and the grievance was duly withdrawn. In our view, any claim for compensation was part and parcel of the earlier claim and must be considered to have been settled with the resolution of the earlier general claim and the subsequent withdrawal of the section 124 application. We do not think it is now open to the union to re-open the matter.

12. Every year trade unions file hundreds of grievances. Most of them are settled. Sometimes the settlement favours the union. Sometimes it favours the employer. Usually it represents a compromise in which neither side achieves as much or risks as much as it would by proceeding to a hearing. Parties come to a settlement in order to avoid the costs and uncertainties of litigation.

13. Settlement is an important part of the labour relations process; and we do not think we should lightly disregard or set aside a settlement which has been achieved. If we were to do so, it would discourage the entire settlement process and undermine the finality and certainty which a settlement is intended to achieve. We are satisfied that the subject matter of the grievance presently before us has been settled and cannot now be revived by the filing of a new grievance. The application is therefore dismissed.

1216-82-R Christian Labour Association of Canada, Applicant, v. Carroll Electric (1982) Limited and J. B. Carroll Electric Limited, Respondents

Sale of a Business – Whether application premature where details of transaction not fully completed – Relevance of anti-union animus to application for declaration of sale – Board finding sale in circumstances

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members S. Cooke and L. Hemsworth.

APPEARANCES: *Owen Gray and Hank Beckhuis for the applicant; Donald F. O. Hersey and Pat Carroll for Carroll Electric and R. F. Cline for J. B. Carroll Electric, respondents.*

DECISION OF THE BOARD; December 20, 1982

1. This is an application under section 63 of the *Labour Relations Act* for a declaration that J. B. Carroll Electric Limited (“J. B. Carroll Electric”) transferred business in whole or in part to Carroll Electric (1982) Limited (“Carroll Electric”) and that Carroll Electric has been and continues to be bound by the terms of the collective agreement between the applicant and J. B. Carroll Electric effective April 1981 to April 1983. As a part of its application under section 63 (Form 26) the applicant also relies, in the alternative, on section 1(4) of the Act to support its request for a declaration that the two respondents carry on associated or related activities or businesses and that they should be treated as constituting one employer for the purposes of the Act from and after September 20, 1982.

2. At the outset of the hearing the respondent, Carroll Electric, requested an adjournment claiming the application was premature because it occurred a mere 12 days after the incorporation of Carroll Electric. This prematurity has caught Carroll Electric, only partially complete in its development as a company “divorced” from J. B.

Carroll Electric. The applicant resisted the adjournment saying that the application was merely made promptly to avoid criticism from the Board for delay in protecting its bargaining rights. The Board ruled that no adjournment should be granted.

3. The evidence is not significantly in dispute. J. B. Carroll Electric was incorporated in 1945 by J. B. Carroll. Since approximately 1970 the employees of J. B. Carroll Electric have been represented in collective bargaining by the applicant. There is a subsisting collective agreement between them which will terminate April 1983. Up until 5 years ago J. B. Carroll Electric had been largely involved as an electrical contractor in the construction of major shopping malls. When this work declined in 1976, J. B. Carroll Electric was under pressure to diversify into other areas of electrical work. Between 1976 and January 1982, J. B. Carroll Electric's business therefore has been comprised of:

- (1) general electrical contracting on a smaller scale than shopping mall construction and bidding related thereto;
- (2) construction of substations;
- (3) maintenance of high voltage equipment;
- (4) service calls from regular customers requiring electrical work.

In January of 1982, consultants were retained by J. B. Carroll Electric to advise on its operations. At this time the staff of J. B. Carroll Electric was down to a minimum and there was such a lull in business activity that the owner and managers of J. B. Carroll Electric did not know whether drastic changes were needed or not. The consultants advised, among other things that J. B. Carroll Electric should not cut its staff any further, it being the consultant's belief that if the company got through the winter of 1982, an economic upturn in the spring would bring sales back. The consultants suggested as well that J. B. Carroll Electric get into annual testing of high voltage substations. Therefore, in May or June of 1982 the company diversified into this new area. This diversification was not without its costs, i.e., \$45,000 (\$30,000 capital outlay for the equipment and \$15,000 of man-hours to sell the service). But even with this new work and other jobs that were picked up during the course of the summer, by August it was apparent that all the contract work would be concluded in 6 weeks.

3. J. B. Carroll Electric is and has been owned, since its inception, by J. B. Carroll who is currently 59 years old. J. B. Carroll was present at the hearing but did not testify, therefore any information about him or his enterprise must be drawn from other witnesses, one of whom was his 30-year old son, E. Patrick Carroll ("Mr. P. Carroll"). Mr. P. Carroll was never either a shareholder or director of his father's company. He has been employed in a number of capacities with his father's business for approximately 17 years. His association was reduced during the years he pursued a degree in engineering science, but in June 1981, having obtained this degree, he rejoined his father's company. Prior to entering this program, Mr. P. Carroll was a licensed electrician, like his father. Part of the motivation for him returning to school was in response to an allegation by the Association of Professional Engineers that J. B. Carroll Electric was engaged in the practice of engineering.

5. Between June of 1981 and September of 1982, Mr. P. Carroll was aware of his father's company's declining position and was concerned about the very continued existence of J. B. Carroll Electric. Not only was the business itself stagnating, but the morale of the employees was deteriorating. Mr. P. Carroll testified that there was a lack of respect between the employees and his father. He did not say why this had occurred. One of the recommendations of the consultants retained in January of 1982 was that Mr. P. Carroll eventually take over J. B. Carroll Electric and his father's involvement be phased out until he became simply an advisor. It is unclear whether this suggestion was the cause of or was merely coincidental with Mr. J. B. Carroll's intention to retire within two years. Early in January Mr. P. Carroll met with J. B. Carroll Electric's employees to discuss the direction of J. B. Carroll Electric would be taking in the future and to this end distributed a proposed organizational chart. This showed Mr. P. Carroll as Vice-President of J. B. Carroll Electric reporting to his father who would continue as President. Mr. P. Carroll described his role as a buffer between his father and the rest of the organization and acknowledged that he was known as Vice-President of J. B. Carroll Electric, even though this is not shown in a formal way "on the books". Mr. P. Carroll went along with the consultants' plan and worked with the employees of J. B. Carroll Electric throughout the spring and summer of 1982 to convince them that he could run his father's business.

6. However, by late August or early September 1982, Mr. P. Carroll considered it necessary to set up his own company. He explained his decision to have been a choice from among several options. One was to take the "high voltage" business and set up a division in his father's company or to set up a whole new company devoted strictly to this work. Mr. P. Carroll rejected the latter because he felt certain "obligations" to his father, and if he had left his father at this time, his father would have had to liquidate inventory. He thought this would make it harder for him to get equipment for the high voltage work he wanted to do. He also said if he left his father and his father had to liquidate, it would have been hard for him to get a start and "we would have lost all our old customers". He acknowledged having advised his father in August that if something was not done, the bank would seize the assets of J. B. Carroll Electric. Mr. P. Carroll stated that he decided not to "take over" J. B. Carroll Electric and retained his father as a consultant, because he had failed to convince the employees he could do this and he was losing their respect in the process. Mr. P. Carroll also acknowledged that one of the liabilities he would have if he took over J. B. Carroll Electric was the rates he would have to pay to its employees. He claimed that if he was to remain in Tillsonburg and do electrical contracting and high voltage work, he had to have "competitive wages". His competitors were non-union and could, as a result, pay less. In Mr. P. Carroll's estimation, employees of J. B. Carroll Electric had taken the company's size for granted and had resisted wage concessions, choosing layoff and UIC payments instead or going to work for a competitor who was non-union. As a result of these high levels of wages, Mr. P. Carroll stated that outside of Tillsonburg, no one could afford "us" – meaning J. B. Carroll Electric.

7. Early in September Mr. Carroll, accompanied by his father, visited a lawyer to discuss his plans to incorporate a new company. The lawyer was a partner of the counsel for J. B. Carroll Electric in these proceedings. The actual incorporation of Mr. P. Carroll's new company was done by a Mr. Greg Mansell who was acknowledged to

have filed the Reply on behalf of J. B. Carroll Electric in these proceedings. The name Mr. P. Carroll chose for his new company was Carroll Electric. In order to use this name he required his father's consent which was obtained September 9, 1982. Carroll Electric (1982) Limited was incorporated on September 17, 1982. The financial arrangements to start up Carroll Electric were a \$10,000 demand loan, advanced September 23, 1982 from a chartered bank, an assignment of book debt to the same chartered bank on October 29, 1982, and a running credit line of \$5,000 on Mr. P. Carroll's personal guarantee. Mr. P. Carroll is the President, and aside from signing officers, there are no other officers or directors. On or about September 16th or 17th Mr. P. Carroll ordered business cards to be printed showing the company's business address as 17 Bloomer Street and the business telephone number as (519) 842-9021. The address of J. B. Carroll Electric was acknowledged to be 17 Bloomer, and the business number 842-9021 to be the first of 4 trunk lines leased by J. B. Carroll Electric. Exhibit 6 was a sample of this business card which Mr. P. Carroll testified had been revised by inking in "5" over the "7" so that the address would read "15" Bloomer Street and the telephone number was similarly changed so that the number was another trunk line of J. B. Carroll Electric. Mr. P. Carroll candidly admitted that these changes took place after he received the instant application. The letterhead of Carroll Electric was created by "cutting and pasting" from J. B. Carroll Electric's letterhead, i.e., deletion of the initials "J. B.", the lightning bolt logo with "J. B." on it and adding "(1982)". The address and telephone number shown on both letterheads are the same. Mr. P. Carroll testified that after September 17, 1982, a shared receptionist answers the phone "Carroll Electric" and no one is confused. This receptionist had been employed by J. B. Carroll Electric immediately prior to becoming receptionist for Carroll Electric. All of the premises located between 9-17 Bloomer Street are owned by J. B. Carroll personally and he rents them in its entirety to J. B. Carroll Electric. In turn J. B. Carroll Electric sublets a portion (one-third) of the premises to Cunningham Sheet Metal, a separate enterprise from either of the respondents. Aside from a residence at 9 Bloomer Street, the remaining area is comprised in major part of inventory owned by J. B. Carroll Electric. Carroll Electric occupies only 5% of this area. The rent Carroll Electric will pay for this had not been finalized at the date of the hearing. A common reception area for all three companies exists behind a door with "17" on it. This area is located in a trailer linked to the main premises. Recently a nearby door has had a "15" affixed to it but no evidence was given as to where this door led. Pictures of this portion of the premises show that the external signs indicating "J. B. Carroll Electric Ltd." remain and that the trucks show the same name and number. Carroll Electric uses these trucks along with tools and equipment belonging to J. B. Carroll Electric but rental or purchase price of them had not been worked out. Carroll Electric has used inventory of J. B. Carroll Electric and has been invoiced for materials used but has not paid for them as of the date of hearing. Mr. P. Carroll testified that he purchases as much as he can to help J. B. Carroll Electric reduce its inventory which is valued at over half a million dollars.

8. On Monday, September 20, 1982, Carroll Electric had 7 employees. All except one (Wayne Beard) had been employed until Friday, September 17, 1982, by J. B. Carroll Electric and four of these six employees were in the bargaining unit represented by the applicant. They, along with other bargaining unit employees, had been advised on September 9, 1982 by Mr. P. Carroll, on behalf of J. B. Carroll

Electric, and by letter signed by J. B. Carroll that "due to economic pressures and lack of sufficient work" they were being laid off effective September 17, 1982. The other 2 not a part of the bargaining unit which were hired from J. B. Carroll Electric by Carroll Electric were the receptionist and operations manager. Mr. P. Carroll said that he alone hired all of these employees and set their rates of wages which are less than what they received at J. B. Carroll Electric and a little higher, though compatible, with competitors. Carroll Electric also does not provide the benefits previously provided pursuant to a collective agreement by J. B. Carroll Electric. Until November 5, 1982, J. B. Carroll Electric retained management employees who were working out their notice period and who will not be employed by Carroll Electric (1982) Ltd. After their departure, there will be no employees remaining at J. B. Carroll Electric.

9. Between September 20th and the date of the hearing, all of these former employees of J. B. Carroll Electric have been engaged in essentially the same sort of work as they had done with J. B. Carroll Electric prior to September 17, 1982. Most of the work described as service calls, have come from former customers of J. B. Carroll Electric. Indeed, the way in which most of this work appears to have come to Carroll Electric was through these customers calling by telephone. Carroll Electric has also been engaged in bidding and doing general contracting work, some of which being work J. B. Carroll Electric was initially involved in. The only employee who had not been employed formerly by J. B. Carroll Electric, Wayne Beard, came looking for a job on September 16, 1982, and "came on staff" with Carroll Electric approximately September 23rd. Mr. Beard is an electrical technician with 6-8 months to go before becoming a certified electrical technician (C.E.T.). As a former employee of Westinghouse, he has been successfully selling Carroll Electric's ability to conduct high voltage testing on a larger scale than done by J. B. Carroll Electric and coordination studies, a service J. B. Carroll Electric never provided. He also has proved invaluable in dealing with an emergent problem at the Simcoe P.U.C. which Mr. P. Carroll could not be sure could have been done by the other electricians. Mr. P. Carroll is interested in expanding this area of the business to take advantage of and to develop his own newly-acquired engineering training and also to have "something extra" that other electrical contractors do not have. Notwithstanding J. B. Carroll Electric having no employees beyond the 2 remaining managers, J. B. Carroll Electric does a "little bit of bidding" along with counting inventory and collecting accounts. There was some conflict in the evidence between what Mr. P. Carroll claims he said to one Ed Hill, a former employee of J. B. Carroll Electric, and what Mr. Hill says he heard Mr. Carroll say regarding how J. B. Carroll Electric and Carroll Electric would operate in future. Mr. Carroll says that he told Hill that "together we had 2 companies; that he would bid on non-union jobs and J. B. Carroll Electric would bid on union jobs". By using "we" at the time, he claims to have meant his father and himself, and that now "we" meant Wayne and himself. Mr. Hill claims that Mr. Carroll, prior to October 2, 1982, told him that basically there were two companies; he was taking over the company as a bidding contractor and there was no union. Mr. Hill claimed that Mr. Carroll said if he got a union job, he would take one employee from the shop and hire men from the area. He did not know whether Mr. Carroll said union people from the area or not and under cross-examination claimed not to understand what Mr. Carroll was telling him at all.

10. Section 63(1) and (2) provide:

63.-(1) In this section,

- (a) "business" includes a part of parts thereof;
- (b) "sells" includes leases, transfers *and any other manner of disposition*, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereof and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(emphasis added)

Section 1(4) provides:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

11. Both sections are directed at the preservation of bargaining rights and allow the "tracing" of these rights through corporate changes and transfers of elements of a business (see *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691). Section 1(4) differs notably from section 63 in that there need not be a transfer of "business" from one employer to the related employer. For this reason section 1(4) has been mainly useful in the construction industry where many of the employers generally do not have the permanence of an investment in a fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from job site to job site or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal or configuration of principals may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business activity as before (*Brant Erecting and Hoisting*, [1980])

OLRB Rep. July 945 at paragraph 13). In such circumstances there would be a continuation of the same business activity without any indicia of a "sale of business" i.e., the apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Section 63 has been largely useful in the industrial sector of collective bargaining where usually there are dispositions of assets, inventory, trade names, goodwill and employees, to name only partially the list of indicia the Board has looked to in order to determine whether a "sale" has taken place.

12. From the evidence presented to the Board it is clear that two corporate entities are involved, thereby bringing both section 1(4) and section 63 potentially into play.

13. In view of the fact that this application was brought under section 63 and that the request for the application of section 1(4) is an alternative ground, the Board has considered primarily whether there has been a "sale of a business" within the meaning of the Act. In most cases the determination of whether a "sale" within the meaning of section 63(1)(b) has taken place is not an issue because the fact that there has been a disposition of some variety is usually clear. The usual question is whether the elements disposed of constitute a "business". In light of the timing of this application and the familial connection between the two respondents, the full dimensions of the disposition in this case are not totally clear. Notwithstanding this lack of clarity, the Board has concluded that a "sale of a business" within the ambit of section 64(1)(b) of the Act has taken place. It has been established for some time that the definition of "sale" in section 63(1)(b) of the Act is capable of describing a multitude of transactions "whether by sale, exchange, gift, trust or otherwise by which property, rights or interests, etc. are transmitted absolutely, conditionally, etc. or by operation of law from one person to another" (see *Thorco Manufacturing Ltd.*, 65 CLLC ¶16,052). While the totality of the details of the transaction between the two companies has not been finally concluded, a sufficient number of the key elements are clear. Carroll Electric rents a portion of the premises formerly occupied by J. B. Carroll Electric. Carroll Electric's name is close enough to J. B. Carroll to require Mr. J. B. Carroll to have given his permission for its use. Carroll Electric has been purchasing the inventory of J. B. Carroll Electric as necessary and there is a clear intention to continue to do so in order that J. B. Carroll Electric's huge inventory be reduced. The financial arrangements, if any, for the use of J. B. Carroll Electric's trucks, tools and equipment have yet to be made. If there are no financial arrangements, then the transaction would constitute at least a conditional gift. Virtually all the remaining employees of J. B. Carroll Electric have been hired by Carroll Electric with only a weekend intervening. Carroll Electric uses the telephone system of J. B. Carroll Electric, for which the latter receives reimbursement, and it is through this system that Carroll Electric has gained access to customers who require service work. No payment has yet been arranged to compensate J. B. Carroll Electric for value of this "goodwill" or these contracts. There is no doubt Carroll Electric has been using these calls as a foundation for starting to build its business.

14. As for whether the "business" of J. B. Carroll has been transferred through the above arrangements or not, the Board has concluded that the core of what J. B. Carroll was doing is now being done by Carroll Electric. The employees who testified for the applicant confirmed this and indeed Mr. P. Carroll himself confirmed this. While a new direction or emphasis in the high voltage work is planned, the basis upon

which Carroll Electric has thus far been built is J. B. Carroll Electric's general electric contracting and service business together with high voltage substation contacts. It is clear that if Carroll Electric were a company incorporated by a manager of J. B. Carroll Electric who was not also J. B. Carroll's son, the Board would have no difficulty in concluding that the business had been transferred within the meaning of sections 63(1) and (2). As the Board stated in *Raymond Cote*, [1968] OLRB Rep. March 1211:

It has been expressed that a business is "the totality of the undertaking". The physical assets of the buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The totality of these along with certain intangibles such as goodwill constitute a business.

Mr. P. Carroll was second in command to J. B. Carroll and was involved with his father's business for 17 years. This, combined with the fact that virtually all of the same customers of J. B. Carroll Electric are now being served by Carroll Electric through the conduit of a shared telephone system and through the skill and know-how of the former employees of J. B. Carroll Electric, has led the Board to conclude that at least part of the "business" of J. B. Carroll Electric has been disposed of. Except for the difference in the form of disposition, these facts are similar to those of *Tatham Company Limited*, [1980] OLRB Rep. March 366 where the Board concluded that an excavating "business" had been disposed of because of the simultaneous transfer of essential assets, know-how of employees and instrumental management people, all of which served the same market from the same physical location. The Board in that case concluded that the transferral of these combination of elements eliminated the former company as a competitor. While in this case Mr. J. B. Carroll may be continuing to do some bidding, which he formerly did, the nature and scale of it presumably has changed in view of the fact that no employees remained in his employ, and there is an intention on his part to retire within 2 years. In any event, the continuation of the major parts of his business is now accomplished by Carroll Electric.

15. It has been said that while no anti-union animus must be proved to succeed under either section 1(4) or section 63, it is nevertheless a relevant consideration (see *Grand Valley Ready Mix*, [1981] OLRB Rep. June 663; *Moore Groceteria Limited*, [1980] OLRB Rep. April 486.) In this instance it is clear that an important reason why Mr. P. Carroll wished to incorporate his company was in order to avoid the collective bargaining obligations under which J. B. Carroll Electric operated. He testified that if he were to remain in the Tillsonburg area and do contracting and high voltage work, he would have to have competitive wages. Since his competitors were non-union, he needed to be non-union. Two years before, J. B. Carroll Electric employees in this bargaining unit had been asked to make wage concessions to be more competitive, but this had been rejected. In light of this the only route to competitiveness was through a non-union work force. Section 63 was enacted to block this very type of avoidance. While the content of a collective agreement always has an impact on competitiveness, any negative impact must be resolved in the normal course of collective bargaining, not

through avoidance thereof. This is not a situation where a company is formed to compete with another. The formation of his own company meant that Mr. P. Carroll was not "leaving" his father. In his own testimony he chose not to leave him because if he did, it would have been hard for him to get started. After all, J. B. Carroll Electric was a going concern with customers, "goodwill", inventory and the kind of equipment best suited to the high voltage work Carroll Electric wished to increase. Therefore, it is the Board's conclusion that incorporation of Carroll Electric was intended in part to avoid one of the two significant liabilities J. B. Carroll Electric had - a collective bargaining relationship.

16. For all these reasons the Board has concluded that there has been a sale under section 63(2) and the Board so declares. In view of the Board's conclusion, it is unnecessary to deal with the applicant's alternate ground resting on section 1(4) of the Act.

17. The Board will remain seized if there is any difficulty implementing this decision.

0229-82-R United Brotherhood of Carpenters and Joiners of America
Local Union 93, Applicant, v. **DI-AL Construction Limited**, Respondent,
v. Group of Employees, Objectors

Construction Industry - Membership Evidence - Petition - Employee mistakenly advised he was employed by union employer signing union card - Later writing resignation from membership - Resignation not entitling Board to disregard membership evidence - Resignation treated as petition - Employer involvement invalidating petition - Vote directed because of doubt as to employee's intentions

BEFORE: Ian Springate, Vice-Chairman, and Board Members J. A. Ronson and C. A. Ballentine.

APPEARANCES: *Denis Power, Wilf Chretien and Wilf Clermont for the applicant; A. Malomet for the respondent; Jean-Pierre Gravel for the group of employees.*

DECISION OF IAN SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER C.A. BALLENTINE; December 2, 1982

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

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3. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated

employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

4. We further find that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause e of section 117 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. We further find pursuant to section 144(1) of the Act that all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. On the date of the filing of the application the respondent employed five employees within the bargaining unit. The applicant filed evidence of membership on behalf of three of these employees. The evidence of membership takes the form of two certificates of membership and one combination application for membership and receipt. The certificates of membership, which relate to two long-time members of the union, are signed by the members and indicate that monthly dues of at least \$28.74 have been paid for at least one month within the six month period immediately preceding the terminal date of the application. The documents are checked and certified correct by an officer of the applicant. The combination application for membership is signed by an employee and the receipt is countersigned and indicates that a payment of \$1.00 has been made within the six month period immediately preceding the terminal date of the application. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

7. The combination application for membership and receipt filed by the applicant union was signed by Mr. Frank Faubert. At issue is the weight, if any, to be given to this particular document. Mr. Faubert commenced working for the respondent on or about April 5, 1982. On April 8, 1982 he was approached on a job site by Mr. Wilfrid Clermont, the assistant business representative of the applicant trade union. Mr. Clermont had come to the site in connection with Nick Giambardino, a contractor bound to a collective agreement with the union who had employees working on the same site as the respondent. The evidence indicates that although Nick Giambardino is required by the terms of the collective agreement to hire carpenters through the union's hiring hall, at times he has ignored this requirement and instead hired tradesmen "off the street". The evidence of both Mr. Faubert and Mr. Clermont indicates that on April 5th Mr. Clermont approached Mr. Faubert and asked to see his union card, to which Mr. Faubert replied that he was not in the union. Mr. Clermont then asked Mr. Faubert who he was working for. Mr. Faubert was not certain of the name of his employer, and accordingly replied "Herve" a reference to Mr. Herve Ladaceur, the respondent's job superintendent. Mr. Clermont did not know who "Herve" was, and assumed that Mr. Faubert was working for Nick Giambardino. On the basis of this faulty assumption Mr. Clermont advised Mr. Faubert that he was required to be a union member to work on the project.

8. Mr. Faubert and Mr. Clermont gave differing versions concerning the remainder of their conversation. Mr. Clermont testified that although he had initially been under the impression that Mr. Faubert was employed by Nick Giambardino, he subsequently concluded that he was in fact working for DI-AL, a non-union firm, and he so advised Mr. Faubert. Mr. Clermont stated that he was certain that he had advised Mr. Faubert that he was working for DI-AL prior to the time that he signed the membership application. For his part, Mr. Faubert testified that when he was advised that he had to be a union member to work on the job, he told Mr. Clermont that he would join the union if he had to. According to Mr. Faubert, Mr. Clermont replied that the matter was not that simple, for although Mr. Faubert could sign an application for membership and pay a dollar, his application would still have to be accepted by the union, and if accepted he would be required to pay an initiation fee of \$265.00. Mr. Faubert testified that he then signed an application for membership. According to Mr. Faubert, it was only some time after he had signed that Mr. Clermont advised him that he was in fact employed by DI-AL a non-union firm and not Nick Giambardino. Mr. Faubert testified that the reason he signed for the union was because he had been advised that he was employed by Nick Giambardino, and that Nick Giambardino was required to employ only union members.

9. On or about April 11, 1982, Mr. Clermont and Mr. Chretien, the applicant's business representative, attended at the job site. Mr. Faubert advised Mr. Chretien that he had signed for the union because Mr. Clermont had told him that he was required to do so. For his part, Mr. Clermont insisted that Mr. Faubert had signed after he had been told that he was working for DI-AL. Mr. Chretien testified that at the end of the conversation, Mr. Faubert stated that he did not want to join the union, and was certainly not going to pay the union \$272.00 if he did not have to. Mr. Chretien's response was that for organizing purposes Mr. Faubert could join the union for \$1.00.

10. Having carefully reviewed all of the evidence, we are of the view that Mr. Faubert's version of what occurred on April 8th is probably correct, and that he in fact signed the application for union membership prior to being advised that he did not work for a unionized firm. We have reached this conclusion in part on the basis of the reference to an initiation fee of either \$265.00 or \$272.00. Although a new member of the Carpenters Union is generally required to pay a substantial initiation fee, when a local is engaged in organizing a firm it generally waives the initiation fee except for \$1.00. This is reflected in Mr. Chretien's comment to Mr. Faubert on or about April 11th, that for organizing purposes he could join the union for \$1.00. Mr. Faubert testified that on April 8th he was advised by Mr. Clermont shortly before he signed the application form that if accepted by the union he would have to pay \$265.00. Mr. Clermont did not deny having made the comment. Further, from Mr. Chretien's evidence it is clear that Mr. Faubert was concerned about having to pay a substantial initiation fee to the union. From these facts we conclude that Mr. Clermont did in fact refer to an initiation fee shortly prior to when Mr. Faubert signed the application for membership. This reference to an initiation fee indicates that at the relevant time Mr. Clermont was still under the impression that Mr. Faubert was a non-member working for an already organized firm, and that only later did he realize that Mr. Faubert was employed by DI-AL. We would note that although we have accepted Mr. Faubert's version of what occurred on April 8th as being correct, we are satisfied that Mr. Clermont was not trying to mislead the Board. Instead, we believe that Mr. Clermont simply did not accurately recall at what point during the conversation he realized that Mr. Faubert was employed by DI-AL rather than by Nick Giambardino.

11. On April 8th, shortly after he had signed the application for membership, Mr. Faubert, on his own initiative, went and explained the circumstances under which he had signed to Mr. Ladaceur, the respondent's job superintendent. On April 13, 1982, the applicant filed a first application for certification (see file no. 0094-82-R). On April 20th, apparently in response to this application, Mr. Faubert approached Mr. Malomet, the respondent's president, to advise him that he did not want to belong to the union and to ask that he write a letter of resignation to the union on his behalf. Mr. Malomet typed out the following letter addressed to Mr. Wilfrid Chretien, the business representative of the union:

"Dear Mr. Chretien:

Further to me signing an application for membership in the carpenters union, I have reconsidered and have decided to withdraw my application. Please return the \$1.00 fee charged and destroy my application."

Mr. Faubert signed the letter, after which the respondent forwarded copies of it to the union and to the Board.

12. For reasons the Board was not advised of, the applicant withdrew its first application for certification, and filed the instant application on April 27, 1982. In support of the application it submitted Mr. Faubert's application for membership. Mr. Faubert testified that following the filing of the second application he again went to see

Mr. Malomet and told him that he did not want the union. Mr. Malomet then wrote out a statement of desire in opposition to the application which Mr. Faubert signed. A copy of the statement was forwarded to the Board by the respondent, along with similarly worded statements signed by the two employees who had not at any point become union members.

13. The respondent contends that since Mr. Faubert signed a resignation from membership in the union, the Board cannot regard him as a union member for the purpose of determining the number of employees who are members of the union under section 6 of the Act. We do not agree. In determining who is a union member for the purposes of the Act, we are bound to apply the definition set out in section 1(1)(1). This section states that a member of a union includes someone who has signed an application for membership and paid a dollar to the union. Mr. Faubert performed both of these steps, and in our view the mere fact that he signed a purported resignation does not detract from this fact. This is not to say, however, that the Board will simply ignore a purported resignation from union membership. The Board's longstanding practice is to treat a purported resignation in the same manner as a statement of desire in opposition to a union's certification signed by a union member, namely, as an indication that the member has had a "change of heart" about union representation. On the basis of such a change of heart the Board may direct the taking of a representation vote, notwithstanding the fact that the union would otherwise be entitled to automatic certification. The Board's approach to these matters was explained as follows in the recent *Baltimore Aircoil Interamerican Corporation* case, [1982] OLRB Rep. Oct. 1387:

"However, even where the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of an applicant trade union the Board may direct that a representation vote be taken pursuant to section 7(2). It is in the exercise of this discretion that the Board considers "evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union", filed with the Board in compliance with Rule 73 of the Board's Rules of Procedure. Stated another way, evidence of objection by employees to certification or of signification by employees that they no longer wish to be represented by a trade union is not, having regard to the scheme of the Act, evidence relating to membership in a trade union for the purposes of an application for certification and for this reason a statement of desire, no matter what the actual wording, does not cancel out or revoke membership evidence submitted by an applicant trade union in the form prescribed by section 1(1)(1) of the *Labour Relations Act*. See *Caldwell Linen Mills Limited*, [1967] OLRB Rep. March 948 at paragraph 10; *Diebold Company of Canada Limited*, [1976] OLRB Rep. May 237 at paragraph 10; and *Re Royal Canadian Yacht Club and Hotel, Restaurant and Cafeteria Employees' Union, Local 75 et al.*, (1981), 129 D.L.R. (3d) 554 at 558. Rather, relevant "overlapping" evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to

be represented by a trade union, filed not later than the terminal date for the application, and where accepted by the Board as a voluntary expression of the wishes of the employee signatories, will generally cast a doubt on the evidence of membership filed by an applicant, (to use the words of the explanatory note found in Form 6) such as to cause the Board to exercise its discretion under section 7(2) and direct the taking of a representation vote. It would be somewhat anomalous if evidence of membership which must withstand the requirements laid down in the Act together with its related rules and forms, could be "revoked" by a much less formal and essentially unregulated course of conduct which usually follows on the heels of an employee having joined a trade union. By making a representation vote the maximum effect of an opposing petition the legislation both accommodates the resiling nature of petition evidence and recognizes that trade union organizing campaigns often require considerable investment of time and monies. Once an employee has signed a membership application form and submitted to the cautionary test of the payment of \$1.00, a trade union is entitled to rely on that commitment for the purposes of an application for certification to the extent that it is assured its application will not be dismissed on the basis of insufficient threshold membership support (i.e. forty-five per cent) by the mere filing of "second thoughts" prior to the terminal date. If this was not the approach taken, a trade union would never know when to cease organizing. It is this relationship between membership and petition evidence which constitutes part of the policy behind permitting this Board to direct a representation vote even when the trade union files membership evidence on behalf of more than fifty-five per cent in the bargaining unit. It is also the reason why the statute distinguishes between an application date and a terminal date."

14. We have before us both a purported resignation from membership and a statement of desire in opposition to the application signed by Mr. Faubert. Having regard to the responsive nature of the employer-employee relationship and the natural desire of an employee to want to at least appear to be identifying with the interests of his employer, the Board's practice is not to regard these types of documents as indicating a voluntary change of heart about union representation where the evidence indicates that management has played any role in their origination. In the instant case, Mr. Malomet's involvement with the origination of the two documents was so great as to cause us to conclude that neither the "resignation" nor the "statement of desire" can be accepted as clearly representing Mr. Faubert's true and independent wishes. Accordingly, neither document would cause us to exercise our discretion to direct the taking of a representation vote.

15. A completely separate issue, however, relates to the reliability of Mr. Faubert's application for membership given the fact that he signed after being mistakenly advised by a union representative that he was working for Nick Giambardino, a firm obliged to employ only union members. The evidence when taken as a whole, raises a real concern in our minds as to whether when he signed the application

for membership Mr. Faubert was indicating a desire to be represented by the union regardless of who his employer might be, and in particular whether he would have signed the document had he known that it would be used to support a certification application with respect to the respondent. In these circumstances, and given the fact that without Mr. Faubert the applicant would not have a majority of bargaining unit employees as members, we are of the view (absent consideration of the section 8 issue referred to below) that it would be appropriate for the Board to exercise its discretion under section 7(2) of the Act and obtain confirmatory evidence of employee desires by way of a representation vote.

16. At the hearing, counsel for the applicant indicated that if the Board was of the view that a representation vote should be directed, the applicant would request that it be certified pursuant to the provisions of section 8 of the Act. In a letter dated November 24, 1982 the applicant formally requested that the Board apply section 8 of the Act, and in this regard indicated that it will be relying on both the evidence already put before the Board in these proceedings as well as a finding of the Board in file no. 1036-82-U that the respondent discharged an employee contrary to several provisions of the Act. In these circumstances, the matter will be relisted for hearing to hear any additional evidence as well as the representations of the parties with respect to the applicant's request that it be certified pursuant to section 8 of the Act.

17. The decision of Board Member J. A. Ronson will be forthcoming at a later date.

0519-82-U Kenneth Chisholm, Martin Gray, Russell Czech, Ronald Scott and Michael Taylor, Complainants, v. **Dominion Citrus and Drug Ltd.**, Respondent

Discharge for Union Activity – Unfair Labour Practice – Employee status not pre-requisite for protection under s.66(a) – Complainants on lawful strike – Vandalism at picket line – Settlement reached with union ending strike – Term of settlement not to recall those charged with strike related offences – Whether settlement and failure to recall unlawful

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members C. G. Bourne and C. A. Ballentine.

APPEARANCES: *Alex J. Ahee and Philip P. Sanders for the complainants; Gordon Atlin, Q.C. for the respondent.*

DECISION OF CORINNE F. MURRAY, VICE-CHAIRMAN, and BOARD MEMBER C. A. BALLENTINE; December 29, 1982

1. This complaint has been filed under section 89 of the *Labour Relations Act* alleging that the complainants were “discharged for their union activities during the strike”. No section of the Act was specifically alleged to have been breached in the

written complaint but both parties nevertheless proceeded to call evidence and make argument on the basis of whether section 66(a) of the Act had been breached.

2. The complainants in their written complaint drawn up by their counsel allege that they were not taken back after the conclusion of a legal strike on February 11, 1982, as a result of the terms of settlement of the new collective agreement (hereinafter referred to as the "settlement agreement") reached between the respondent and the Warehousemen and Miscellaneous Drivers, Local Union 419 (hereinafter referred to as "the union"). As originally framed, the complainants alleged that the union was also in breach of the Act, presumably section 68, in entering this settlement agreement. Subsequently, the allegations against the union were withdrawn so that the sole complaint was that the company was improperly motivated by "anti-union animus" in concluding the settlement agreement.

3. The complaint itself only referred to acts of the complainants "during the strike" as being the unlawful reason for the termination of their employment. The respondent made no demand for particulars as to what was meant by the words "during the strike". The evidence and argument proceeded on the basis that this was the relevant time frame during which the complainants allege they engaged in the union activity for which they were wrongfully terminated.

4. The respondent is a fruit and vegetable supplier. Its premises are located at the Ontario Food Terminal, a facility also occupied by others involved in the business of transshipment of food. The respondent and the union have had a collective bargaining relationship since the mid-60's. Five or six collective agreements have been entered into since then. The first labour dispute between them causing a disruption of operations, a strike, occurred on November 18, 1981, when negotiations to renew the collective agreement, which had expired September 30, 1981, broke down. The strike which ensued was a long one, lasting until February 11, 1982, and by all accounts a violent one. As is the respondent's right, it attempted to and apparently succeeded in continuing to operate during the whole of the strike.

5. Kenneth Chisholm testified that he began his employment with the respondent in October of 1980. The seniority list shows his seniority date to be October 14, 1980. He had been discharged prior to the commencement of the strike. According to the respondent, this was done because he failed to deliver an order on Friday, November 13, 1981, without reasonable explanation and left produce in his truck in such disarray that some of it was adjudged unsaleable. His termination was confirmed by letter dated November 16, 1981. Mr. Chisholm stated that he had been suspended earlier for the same thing. During his employment, he had never held any official capacity in the union. Notwithstanding his termination prior to the strike, he picketed the respondent's premises during the strike.

6. Martin Gray testified that he became an employee of the respondent on November 22, 1979. This is the seniority date shown on the seniority list. He was discharged on October 30, 1981, for having "slept in" on the same day. The letter of termination discloses, and Mr. Gray himself confirmed, that he was notorious for being late. There was no evidence that he had during his employment held any official capacity in the union. Notwithstanding his termination prior to the strike he regularly picketed the representative's premises during the strike.

7. Russell Czech testified that he began his employment with the respondent 11 months prior to the strike. According to the seniority list, his seniority date was January 19, 1981. During his employment, he had never held any official capacity with the union. He said he went to the picket line every day except Saturdays.

8. Ronald Scott testified that he was employed with the respondent approximately 2 years prior to the strike. The seniority list shows his seniority date to be December 20, 1979. Three months prior to the end of the collective agreement, on September 30, 1981, he was elected for the first time as shop steward. He had held no other union office prior to this during his employment with the respondent. Two other employees, Neil Kennedy and Paul Dunne, were re-elected shop stewards at this time also. Stewards are elected at this time pursuant to the collective agreement to carry out the usual duties of stewards regarding the administration of the collective agreement and to participate as a part of the negotiating committee for its renewal. When the strike began, a picket line was set up and Mr. Scott and Mr. Dunne were the picket leaders or captains.

9. Michael Taylor estimated his length of employment with the respondent to have been approximately 13 months. The seniority list shows his seniority date to have been January, 26, 1981. There was no evidence that he ever held any union office while he was employed by the respondent. He said he was on the picket line every day for about one month until he got "barred by the Court".

10. The respondent denied that the complainants Scott, Czech and Taylor were discharged because they had engaged in legitimate union activity during the strike. It is the respondent's contention that these complainants were discharged as a part of a "bitterly disputed" negotiation with the union. As for the complainants Gray and Chisholm, the respondent claims they had been discharged prior to the strike and therefore were not in the employ of the respondent during or after the strike. In any event, the respondent denied their terminations were maintained because they had engaged in legitimate union activity; they were not reinstated as a result of the same set of negotiations which terminated Scott, Czech and Taylor. The respondent contended that the only factors which dictated the discharge or maintenance of discharge of all the complainants were:

- (a) the respondent's honest belief that all of them had been charged with "strike related offences";
- (b) the fact that their seniority was approximately 2 years or less;
and
- (c) the desire to resolve the strike and get a collective agreement as quickly as possible.

11. There appears to be no dispute between the parties that because of a settlement agreement between the respondent and the union, the complainants Scott, Czech and Taylor did not return to work and the complainants Gray and Chisholm were not reinstated. The portion of the settlement relevant to these proceedings are set out in paragraph 8 of a letter dated February 11, 1982, (Exhibit 6) from Mr. Sean Floyd,

Secretary-Treasurer of the union, to Mr. Irvin Cass, Legal Advisor and Chief Negotiator for the respondent:

8. The following employees would not be taken back by the Company:

SCOTT
TAYLOR
CHISHOLM
TOOHEY
GRAY
CZECH

The following employees would be suspended for a period of one (1) month upon their return to work:

KENNEDY
COLE
EBERLEY
REYNOLDS
BURNS

On this basis, the Company agrees to provide the Union with a letter indicating that no further discipline, suspensions or discharges would be implemented against any employee who may be subsequently convicted on a strike-related offence.

12. Based on the evidence given before the Board as to how this agreement came about, it is clear that:

- (1) All of the individuals named in paragraph 8 of Exhibit 6 had engaged in picket line activity.
- (2) Two of the three stewards (i.e., Kennedy and Scott), elected in July of 1981 to form part of the negotiating committee (along with Mr. Floyd and Mr. Vern McGuire, Business Agent of the union), were on the list set out in paragraph 8 of Exhibit 6.
- (3) The least senior among those who were returned to work pursuant to paragraph 8 of Exhibit 6 was Roy Burns (January 20, 1976). The most senior among those who were not taken back was Martin Gray (November 22, 1979).
- (4) Until February 5, 1982, the respondent indicated it would not take back any employees who had been charged with "strike related offences".
- (5) Mr. Floyd knew that Mr. Michael Blidner, the President of the respondent, had taken this position early in the strike. In January or February Mr. Floyd told Mr. Scott that Mr. Blidner

had indicated he would not take back anyone who had been charged with "strike related offences". Until February 5, 1982, the union's position regarding this policy was that there could be no settlement on that basis.

- (6) At a meeting on February 5, 1982, the uncompromising positions of both the respondent and the union regarding those who would or would not be returned to work after the strike began to soften.
- (7) From February 5, 1982, until the conclusion of the settlement agreement, none of the stewards were involved in the settlement discussions.
- (8) The union, through Mr. Floyd, knew that the reason the issue of continued employment of the persons listed in paragraph 8 of Exhibit 6 was a part of the settlement discussions was because Mr. Cass believed that these persons had been charged with "strike related offences".
- (9) The union, through Mr. Floyd or anyone else, did not correct or take issue with the validity of Mr. Cass' belief in connection with the names listed in Exhibit 6.
- (10) The majority of members of the union attending a ratification meeting accepted the settlement agreement (Exhibit 6) and after this a collective agreement was concluded.
- (11) Mr. Scott attended this meeting.

13. The key issues are:

- (1) Why Mr. Blidner adopted the policy of refusing to continue the employment of strikers who were charged with "strike related offences".
- (2) How names came to be placed on the list set out in Exhibit 6.
- (3) Whether seniority was the only factor used by the company to distinguish who on this list would return to work after the strike.

14. From the commencement of the strike the atmosphere was described by Mr. Cass as "not a pleasant one". From the respondent's point of view, there was concern about the strike being called and a belief that it was unnecessary and irrational. Neither Mr. Cass nor Mr. Blidner expected the strike. The respondent had delivered to the union an offer confirmed by letter on November 13th (Exhibit 1) which the respondent believed to be a reasonable one. When the membership rejected it in the late afternoon or early evening of November 13th, Mr. Cass described the respondent's officials as

being disappointed and lacking in understanding why this had happened. The respondent stated in Exhibit 1 that the “stewards” had broken off the last meeting on November 12, 1981. It is notable also that Exhibit 1 was addressed to Mr. Bud Bodkin, President of the Union, and Mr. Floyd and not any of the three stewards already named who also were on the negotiating committee. Mr. Cass testified that issues had arisen at the last moment in the negotiations, but even with that, the respondent felt a collective agreement could be concluded without a strike. According to Mr. Scott’s evidence, the final stumbling block was a signing bonus, and it was over this that negotiations broke off. Exhibit 1 does not appear to deal with this issue. Mr. Cass believed that the strike would last three weeks “maximum”. In fact, it lasted almost 3 months.

15. The respondent claimed there were acts of vandalism (radiators pierced and tires slashed) against its fleet of trucks just prior to the strike beginning and continuing after the strike. The acts of vandalism were not only against the trucks owned by the respondent but also against the trucks of its two wholly-owned subsidiaries. In addition the customers of the respondent had a large number of their trucks vandalized. There were also acts of injury and assault on individuals. The damage was so extensive that within two weeks of the strike the respondent’s “vandalism insurance” was cancelled. Mr. Floyd testified that it was the most violent strike he had encountered in 11 years; he did not dispute that the property of the respondent, its subsidiaries, and customers was vandalized. According to Mr. Blidner’s evidence, he instructed Mr. Cass very early in the strike to tell the union that unless the vandalism stopped, he would never entertain taking back any employees who had been charged with “acts of violence against the company” or with “damage to company’s property or people”. Mr. Blidner himself was not questioned as to what exactly prompted these instructions but Mr. Cass gave evidence that Mr. Blidner felt the executive officers of the company would have had a difficult relationship with the employees if those who had engaged in the strike-related violence returned to work. According to Mr. Cass, Mr. Blidner was also concerned about the effect their return to work would have on customers. They also wanted the vandalism to stop.

16. Apparently the vandalism to the respondent’s property did not stop. It is unclear whether Mr. Blidner simultaneously with the above instructions or some time later instructed Mr. Cass to take whatever steps necessary through police or otherwise to determine who was charged. Pursuant to these instructions, Mr. Cass made repeated telephone calls to the various police forces under whose geographic jurisdiction the respondent and its subsidiaries came (i.e., Metro Toronto Police and Peel Regional Police) and to various Crown Attorneys’ offices. He testified that he did not make these calls on a regular basis nor did he assign a person from his office to regularly or sporadically attend at these locations to make inquiries. His form of inquiry varied depending on whether or not he had a specific name of an individual. If he had a name, he would inquire about the person. He said he would on occasion ask a general question as to whether any employees of the respondent had been charged. He could not recall which of the names listed in Exhibit 6 he had made specific inquiries about and which he had been informed of as a result of a general inquiry. In instances where he had a specific name, which instances he could not recall, Mr. Cass said he would have received the name from either the media or company officials. Mr. Cass could recall that Mr. Kennedy’s name was initially given to him by someone in the company or the police. To the best of his recollection, he was given the names of Cole, Eberley,

Reynolds and Burns by the police. Mr. Toohey was not mentioned by Mr. Cass in his examination but Mr. Floyd admitted that he himself brought Mr. Toohey's name up on the settlement discussions and he was added to the list in Exhibit 6 because he had quit the picket line on the second day. According to Mr. Cass, Mr. Gray and Mr. Chisholm were added to the list because Mr. Floyd wanted them dealt with as a part of the settlement discussions. Mr. Cass claimed that the 11 appearing on the list in Exhibit 6 were the only ones he knew, by means of verification by the police, by contacting the Crown Attorney's office or by reliance on Mr. Floyd, had been charged with strike-related offences. Mr. Cass admitted that he could have overlooked employees charged with strike-related offences and that he felt that way at the time of his investigation and at the date of hearing. He explained that his inquiries of police and Crown Attorney offices were frequently rebuffed. Mr. Cass' explanation for his unsystematic approach was that he did not give priority to the fulfillment of Mr. Blidner's instructions to discover who was charged. He said he made the priority issue the settlement of the strike, which he perceived to be in no one's best interest. He conceded he perhaps did not go after the discovery of those charged with the same intensity that Mr. Blidner wanted but he pointed out that if the list of names of those charged had been larger, it would have been more difficult for him and the union to settle.

17. Mr. Cass testified that it was only in February 1982 that he put together a list of names of those charged. Up to that point when the police or the Crown Attorney confirmed a person being charged he would write a memo to himself and "throw it in the file". He also said he confronted Mr. Floyd with the information he received from these authorities and Mr. Floyd would confirm his information. Mr. Cass did this because when he first informed Mr. Floyd of Mr. Blidner's instructions to him that no one would be returned if charged, Mr. Floyd "put (him) to the test to prove (his) suspicions". According to Mr. Cass, it was only in the "final days" that names became relevant. Mr. Blidner did testify that he kept his own list which he said he couldn't find, and at another point in his testimony claimed to have been given "a list" by Mr. Cass of those charged. There was no cross-examination of him as to when and how the latter list was given and whether it was the same list as he kept himself.

18. The complainants contested two aspects of the way the list in Exhibit 6 was composed:

- (1) that Mr. Cass and/or the company had been selective in who was placed on the company's "list" of those charged and therefore those who would be terminated;
- (2) that the methodology of how the charges were laid was tainted with anti-union animus.

19. In pursuit of the first point the complainants relied on the evidence of Mr. Floyd and Mr. Scott. It appeared that their evidence was led to show that the list in paragraph 8 of Exhibit 6 was larger than the 11 named and that the paring down of the list of those charged was done with anti-union animus. Mr. Floyd's evidence related to the February 5th meeting and a conversation he had with Mr. Blidner in Florida prior to that meeting. As has been mentioned, the rigid positions of the respondent and the union regarding those who had been charged with "strike related offences" first started

to soften at a meeting on February 5, 1982, between Mr. Cass and other company representatives, exclusive of Mr. Blidner, and Mr. Floyd and other union representatives, exclusive of the 3 stewards. At this meeting a compromise of "the company backing off somewhat and the union backing somewhat" was proposed by Mr. Cass. Mr. Floyd testified that at this meeting Mr. Jesse Zelokawitz, Assistant General Manager of the respondent, had asked "how many were charged" and the answer was given in the general area of 16 to 18. Initially Mr. Floyd did not testify as to who answered this question but later in cross-examination he testified Mr. Cass indicated at the meeting he knew of 16 to 17. Mr. Floyd claimed initially that there was no discussion of names at this meeting but later in his testimony he claimed Mr. Cass said he understood Paul Dunne had been charged. Since the company's position at this meeting continued to be that anyone charged would not be taken back, Mr. Floyd claimed he understood at this time that Paul Dunne would be among those not taken back. Mr. Cass specifically denied any awareness at the time of settlement that there were criminal charges against Mr. Dunne. He explained that Mr. Dunne's name was not on his list of those charged because it had been raised by Mr. Blidner at some point (other than the February 5th meeting) and when he conveyed the company's suspicions at some unidentified point in time to Mr. Floyd, he said "it wouldn't fly". Mr. Floyd neither confirmed nor denied this. Mr. Floyd also testified about a conversation he had some time prior to February 5, 1982, with Mr. Blidner at Mr. Blidner's Florida residence, during the course of which Mr. Blidner mentioned the names of Mr. Scott and Dino Fortunato as being people that Jesse Zelokawitz and "the boys" would have some difficulty working with if they came back after the strike. Mr. Blidner was not cross-examined on whether he had named names to Mr. Floyd at this time and he gave no reply evidence. Mr. Blidner claimed he had no "list" of those charged at this time and his only source of knowledge as to who was charged was by talking to his management team and Mr. Cass.

20. No witness called by either the respondent or the complainants gave any evidence as to when the settlement discussions between the respondent and the union first dealt with actual names of those who would or would not be returned to work because they had been charged. Mr. Floyd acknowledged that he himself never had a complete list of 16 names. He also acknowledged "the union knew" there were charges against more people than those listed in Exhibit 6 but did not know all of their names. To deal with this situation the final clause of paragraph 8 of Exhibit 6 was added. While Mr. Scott testified that he knew that more than sixteen people were charged, he was not present at the February 5th meeting nor was he party to any discussions between the company and the union after this point in time. There is no evidence that Mr. Floyd was advised by Mr. Scott of all the names of those charged.

21. In pursuit of their second contention, i.e., that the way in which the charges came to be laid was tainted by "anti-union animus", the complainants testified about their charges. At least one of the complainants were charged with an offence only the police would lay, i.e., obstructing the police, whereas most of the others were charged as a result of company officials laying an information. No evidence was led as to the method of laying charges against the other 6 people named in paragraph 8. Mr. Scott testified that he told the union that the company was being unfair in proposing the arrangements set out in paragraph 8 of Exhibit 6 but at the ratification meeting he did not speak against it. It was clear from Mr. Floyd's evidence that Mr. Floyd accepted that the reason the employees were on this list was because of the fact they had been

charged. It appears from the evidence of Mr. Scott and Mr. Gray that as many as 10 of the 21 employees named by Mr. Scott as having been charged were regular and "faithful" picketers in the early morning hours of each day. Mr. Scott indicated that they were:

himself (until barred by the police)
Kennedy (until convicted)
Czech
Taylor
Gray
Chisholm
Paul Dunne (who according to Mr. Scott was one of those charged
on the first day of the strike)
Dino Fortunato
Mike O'Connell
Art Fogel

The names of Mario Bucceri, Joe Tenina, Ray Burns and Alex Vance were mentioned by him as being "floaters", i.e., those people who picketed another gate (exit gate) at the same time as this group of 10 picketed the main gate. These floaters would congregate around the main gate line for upwards to a half an hour in the morning and then they proceeded to the exit gate. Of this group only Roy Burns was charged. Mr. Murphy, Operations Manager of the respondent, and Mr. Whelan, Foreman at the respondent, were called in reply to testify how some of the charges came to be laid. Mr. Murphy testified that he laid charges on behalf of the company against Mr. Gray and Mr. Taylor and that there may have been others which he could not recall. He was not asked as to whether he did so with instructions from the company or in pursuit of the company's policy to not return to work those charged. Mr. Whelan testified that he laid charges against Mr. Scott because he believed Mr. Scott was responsible for damaging his camper and threatening him with physical injury. He said Mr. Murphy did not instruct him to lay these charges. Mr. Scott described the time at which he and the other 10 were picketing to be a "busy time" with greater activity by trucks and people hired by the respondent attempting to cross the picket line. The people who were not charged, according to Mr. Scott, were those who regularly picketed in the latter part of the day when it was quieter, but this statement does not coincide with his evidence regarding the "floater" group who apparently were at the main gate for at least half an hour every morning as well and picketed the exit gate thereafter. Only one of these floaters was charged.

22. With respect to how the settlement agreement was concluded, the primary evidence was given by Mr. Cass and Mr. Floyd, since they were the main architects of it. Aside from the conversation already mentioned with Mr. Blidner in Florida, it appears Mr. Floyd never spoke with him during the strike on the topic of who had been charged or who would not be returned to work. Mr. Blidner's evidence is important, however, in that he was the person giving Mr. Cass instructions and to that extent knew, upon what basis the discussions were proceeding. Mr. Scott and the other complainants had no knowledge of how the settlement agreement was negotiated. According to Mr. Cass and Mr. Blidner the agreement in paragraph 8 of Exhibit 6 was

achieved through a lot of “arm-twisting” of Mr. Blidner by Mr. Cass. Mr. Cass described the settlement achieved in paragraph 8 of Exhibit 6 to have “gelled” after numerous discussions. At the February 5, 1982 meeting he said he had indicated to the union that the company would back off somewhat from its original position that all those charged would not be returned if the union would back off its position that everyone, regardless of charges, had to be returned. Mr. Cass claims that Mr. Floyd responded by saying that if there was to be a compromise, it had to be based on seniority and, in particular, there was no way they could allow Neil Kennedy’s discharge to stand regardless. This portion of Mr. Cass’ evidence was never put in a satisfactory form to Mr. Floyd to give him an opportunity to confirm or deny it. Mr. Cass describes the company’s decision-making process to be based on taking a look at the seniority list the company had and noting there was a clear-cut line between service ranging between 5/6 years to 18 years and those between 23 months to 4 months, and that this was the natural division line. He describes the compromise with the union to have “settled in on the line between less than 2 years seniority and more than 2 years seniority”. At this point Mr. Floyd said he would have to seek membership approval and Mr. Cass indicated to Mr. Floyd that he believed he could get Mr. Bildner’s approval. Mr. Cass did not give a detailed description of how each name came to be agreed to and why. He was not cross-examined on his evidence as to how the settlement came about, specifically whether he or anyone else made representations to the union that the agreement was based on seniority. Mr. Cass was not called in reply to refute anything Mr. Floyd said. Mr. Blidner, like Mr. Cass, did not give a detailed description of how each name was dealt with. His evidence was that “we started with seniority and with a lot of arm-twisting by Mr. Cass, a solution was worked out” and that “after much negotiations we established a cutoff point”. Mr. Blidner said this cutoff point seemed to be a “logical one” and that there was no other reason except seniority. He said he instructed Mr. Cass to settle the question by using the seniority date of 2 years as the cutoff. Prior to these instructions, Mr. Blidner testified he agreed to the names of those who would be taken back one by one, starting with Mr. Kennedy. The details of how this happened and who was traded for whom were not given. Mr. Blidner understood that there would be no way a settlement could be achieved with a man of Mr. Kennedy’s seniority terminated. Working down the list of eleven names supplied to him by Mr. Cass arranged in descending order of seniority, Mr. Blidner testified that he dealt with them one by one and ultimately agreed that the cutoff would be at Burns.

23. As was mentioned previously, Mr. Gray and Mr. Chisholm were not originally part of the group who would be the subject of negotiations as to who, of those charged, would return to work after the strike. These names were “brought up” by Mr. Floyd. Mr. Cass originally took the position that they were irrelevant but he ultimately decided to let Mr. Floyd raise them. He did not know why Mr. Floyd wanted them as part of the list. Mr. Floyd’s evidence does not confirm or contradict this. Mr. Floyd said that a company representative, Mr. Zelokawitz, “mentioned” Mr. Gray’s name at some point as being a person with a bad attendance record and someone who had been discharged prior to the strike but he was not asked and he did not say the name of Mr. Gray was “brought up” or raised by the company. Mr. Floyd believed the reason for putting Mr. Gray on the list was that he had been discharged prior to the strike and he got into trouble on the picket line.

24. According to Mr. Floyd no one brought up the "deal" as to who would be returned and who not – it simply was a matter of the company indicating certain individuals they would not take back or the strike would continue and the union indicating who they wanted back or the strike would continue. Mr. Floyd testified that there were certain people among those charged regarding whom the union took a firm position that they had to be returned. They were Kennedy, Cole, Eberley, Reynolds and Burns. In the union's view these men were "synonymous" with Dominion Citrus and Fruit, having in the past acted or were during the expired collective agreement acting as stewards. They were familiar to the union over the years and Mr. Floyd, along with the other officers, felt that he had "more in common" with them than, for example, Russell Czech who they did not even know. According to Mr. Floyd the name of Mr. Taylor was brought up by an unnamed company official in these negotiations as being someone it would not like to take back because he had "personal" as well as "strike-related charges" outstanding against him. As has been stated previously, Mr. Floyd believed that he himself brought up Mr. Toohey's name because he had quit the picket line on the second day of the strike, and if they were playing a "numbers game", he could be on the list to go instead of Burns. Mr. Floyd was asked directly whether seniority was a criteria for taking people back. He replied that as far as the union was concerned, this was only with respect to Neil Kennedy. He claimed that when the company gave reasons for why the 6 people would not return to work, "lack of seniority" was not one of them. The culminating point of the negotiations regarding this matter was a "big debate" over Mr. Burns. Mr. Cass, according to Mr. Floyd, finally relented and said that "Okay, we cut off at Burns". Neil Kennedy was also a person Mr. Floyd described the company being adamant on "until the last minute". He repeatedly denied that the determination as to who would get back was represented unequivocally to him by the company as being based on seniority. He mentioned various company officials as having not wanted to have some of the complainants returned to work for reasons other than seniority or union activity. Mr. Scott said that Mr. Murphy, prior to the strike, indicated to him that he would be the first "to go" if there was a strike. Mr. Murphy denied saying this. Mr. Floyd gave evidence to the effect that Mr. Blidner in his conversation with him in Florida mentioned Mr. Scott as being bad for the company and bad for the union. According to Mr. Floyd, Mr. Blidner never mentioned his union activity but noted he had a "mystical" ability over people and he mentioned he had never had any trouble with either Kennedy or Dunne. Mr. Blidner did not give reply evidence.

25. Section 66(a) provides:

No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

The Board has determined that Mr. Gray and Mr. Chisholm's treatment fall within the scope of its jurisdiction under section 66(a) notwithstanding their discharge prior to the

commencement of the strike. In order for the Board to have jurisdiction under section 66(a) it is not necessary to show employee status.

26. It is now well established that in section 89 complaints where it is alleged that the employer has refused to employ or continue to employ a person because that person was or is a member of a trade union, or was or is exercising any right under the Act, the employer must establish that the reasons given for the refusal to employ are the only reasons and that these reasons are not in any way tainted by anti-union motivation. (See *Re Winchester Press Limited*, [1982] OLRB Rep. Feb. 284, and the cases cited therein.) All of the five complainants engaged in a lawful strike and in connection therewith picketed regularly at the premises of the respondent. Mr. Scott was their picket captain or leader. The question is whether any actions of the respondent toward them during the strike were motivated by exercising any of their “rights under the Act”. The phrase “rights under the Act” has been interpreted to include the freedom given under section 3 to participate in a trade union’s legitimate activities (see *St. Catharines General Hospital*, [1982] OLRB Rep. Mar. 441). There can be little dispute that the right to engage in lawful strike activity is protected under section 66 (see *C.P.R. v. Zambri*, 62 CLLC ¶15,407). Picketing is a normal adjunct of striking and would also be protected under section 66. Similarly, it has been found that a person has a statutory right to act as union steward and employees who elected him/her to act as steward, have a statutory right to be so represented (see *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254). The Board is satisfied on the evidence that Mr. Blidner did not adopt the policy of refusing to continue the employment of those employees charged with “strike-related offences” for any improper purpose. The Board accepts that this was an honest reaction to the information that the property of the company, its subsidiaries and its customers were being vandalized and individuals threatened and assaulted. He did not want anyone responsible for this to continue as an employee of Dominion Citrus & Fruit. There was no evidence from which an inference can be drawn that this policy was directed against union leadership or anyone else who was engaging in legitimate trade union activities. Initially, the policy was dependent on vandalism ceasing, i.e., unless the vandalism stopped, those charged would be discharged. In the face of the continued vandalism and threats, Mr. Blidner gave instructions that no one charged with “strike-related offences” would be taken back. This applied to all the employees on strike and there is no evidence from which any inference can be drawn that the charges were laid against only certain striking employees who held leadership or significant roles in the strike or against people simply because they were engaging in legitimate union activity. Where there is an honest belief that there is serious misconduct in the picket line, the misconduct is not protected by the Act (see *Cadillac Fairview Corp. Ltd.*, [1982] OLRB Rep. Sept. 1262).

27. While the respondent failed to explain through its witnesses the temporal relationship between Mr. Blidner’s policy that no one who had been charged with strike-related offences would be returned and his instructions to Mr. Cass to discover who was charged, this is not a significant point in light of the fact that the Board has concluded that this policy was not motivated by any prohibited purpose. Mr. Cass acknowledged that his pursuit of confirmation of those who were charged was not perfect and he could have missed some who were charged. He also acknowledged he did not want the list expanded. The evidence that as many as 21 were charged does not

unsettle Mr. Cass' evidence because Mr. Cass never professed to know everyone charged. Mr. Floyd's evidence that Mr. Cass mentioned a higher number of those charged also does not cause the Board to conclude that the list of 11 was only part of a greater number known to Mr. Cass, through police and Crown Attorney sources, to have been charged. The discussion at the February 5, 1982 meeting appears to have been of a preliminary, probing nature and this makes it understandable that inaccurate numbers could be mentioned. This is especially true in view of Mr. Cass' evidence that no list of names was drawn up until late in the negotiations.

28. We have concluded that the respondent has not satisfied us that the only reason why the settlement agreement took the form it did, was simply because of seniority. The union did set the stage for the subsequent settlement agreement when Mr. Floyd took a "firm position" with respect to Kennedy, Cole, Eberley, Reynolds and Burns. All of these people were former stewards or current stewards and long-term employees. It was notable that Mr. Scott was not named as a part of this group even though he was a steward. Mr. Blidner's evidence was that the names of the 11 were considered one by one by the parties. But neither he nor Mr. Cass explained how each name was considered. As was mentioned at the outset, the complaint against the union was withdrawn by the complainants and the sole determination is as to whether the respondent breached section 66(a) in reaching the settlement agreement. The issue before this Board is the determination of the respondent's *motivation* in entering the settlement agreement. The issue as to what motivated the union is not. In this light the evidence of Mr. Floyd which explains how and why *the union* felt it could agree to the settlement in Exhibit 6 is not relevant. However, other aspects of his evidence, which are probative, related to what he heard named and unnamed officials of the respondent say about the five complainants. The Board is satisfied that in connection with Messrs. Gray, Chisholm and Taylor the reasons which Mr. Floyd claims were cited by the various company officials were unconnected with any trade union activity. None of the reasons mentioned are violations of section 66(a) and the Board does not believe that these reasons were mere facades for an underlying anti-union motivation. With respect to Mr. Toohey the respondent was simply agreeing with the union's desire to have him included on the list of non-returnees. No evidence was given by Mr. Floyd about any company official mentioning any reason why Mr. Czech would not be returned. In any event the only trade union activity they all engaged in was picketing and the Board has already found that how the charges came to be laid against them and the policy of not returning those charged were not violations of the Act.

29. Mr. Scott's position in all this appear to have been significantly different from the other non-returnees. He was a prominent player in picket-line activity as a picket leader or captain. He had until his suspension in January 1982 acted as the elected steward. It is clear from Mr. Floyd's evidence that the name of Mr. Scott was mentioned in quite a number of meetings regarding who of those charged would return and that Mr. Blidner, during the discussion in Florida which preceded the settlement discussions, had said he felt Mr. Scott was bad for the union and bad for the company. While not mentioning specifically his union activity, Mr. Blidner did contrast his control over the people in the bargaining unit with the other stewards who had held office prior years, Kennedy and Dunne. The Board has concluded that Mr. Scott was seen as the real leader of the striking employees both before and after the strike. In agreeing to the union's demand that more long-standing employees be retained, the

respondent was able to rid itself of Mr. Scott who could control people in such a way as to have them not only engage in an unprecedented strike, but also was responsible for the strike's nature and length. Mr. Blidner's words to Mr. Floyd in Florida certainly can be ascribed to Mr. Scott's role either before and after the strike began or both. In view of the fact that the respondent failed to lead evidence in sufficient detail regarding the way in which individual names were put on the two parts of the list in Exhibit 6 and the failure of Mr. Blidner to rebut or explain in Reply his remarks to Mr. Floyd in connection with Mr. Scott, the Board is not satisfied that in connection with Mr. Scott the only reasons for his not being returned to work was the fact of his being charged with strike-related offences and was without sufficient seniority.

30. The Board therefore finds that with respect to Mr. Scott the respondent breached section 66(a) of the Act and the Board hereby orders Mr. Scott reinstated forthwith and entitled to compensation for lost wages between February 11, 1982, and the date of reinstatement, subject to a one-month suspension he would have received if he had been on the list of returnees, and to any proof of failure to mitigate or earnings from any other source of employment.

31. The Board will remain seized of this matter in the event that a dispute arises concerning the implementation of the Board's order.

DECISION OF BOARD MEMBER C. G. BOURNE;

1. I concur in the decision of the majority dated December 29, 1982, insofar as it concerns four of the five grievors, but I cannot agree that the fifth, Scott, should be reinstated in employment. His situation does not differ in substance from the others.

2. The majority decision goes into considerable detail as to the principle of seniority in establishing who would be reinstated at the conclusion of the strike. The record, however, shows that while seniority was referred to from time to time, there was no consistent position taken by either party. Names were added to, or removed from, the recall list as negotiations proceeded. Floyd, Secretary-Treasurer of Local 419 and Chief Negotiator, freely admits there was a "trade off" between those whom the company adamantly refused to accept, and those whom the union said must be restored as a precondition to settlement.

3. The company steadfastly maintained at the outset what it would not reinstate any employees who were *charged* with criminal acts, but under the pressure of events it was apparent that no settlement could be reached under such a proscription. They then modified their position by saying there would be no reinstatement of those who were *convicted* of such offences.

4. The Union, on its part, insisted that certain "key employees", e.g. Kennedy and Dunne, must be reinstated. In the end, the lists were finalized by the "trade off" between the parties. Floyd said the strike had run its course, and that after discussions with Thibault, President of Teamsters Joint Council #52, two options confronted them: to reach the best settlement they could, or continue the strike which might result in losing 72 people.

5. The grievors have alleged a violation of section 66 which prohibits any interference with an employee's rights under the Act. No such violation has been established. The grievors have been denied reinstatement because they were charged with offences which are not protected under the Act. See *Rehau Plastiks of Canada Limited*, [1979] OLRB Rep. Nov. 1105 and reconsideration in [1980] OLRB Rep. May 774. In *Rehau Plastiks*, an employee was discharged for "illegal activities in attempting to damage company property, for which you were arrested by the police...". The Board went on to say, at p. 1105:

6. The Board's statement in *A.A.S. Telecommunications*, makes it clear that, when the Board is determining whether there has been a violation of the employee protections in the Act, the critical element is whether the employer's actions contain any anti-union motive. *It is not the Board's task, in these types of complaints to establish if there is sufficient or just cause for the employer's actions.* Therefore, while the employer, in coming forth with a credible explanation of his actions, may establish just cause for them, he must also satisfy the Board that there was not, co-existing with the just cause, the element of anti-union motive. In other words, just cause standing alone is not an adequate defence against an alleged violation of the employee protections in the Act. *On the other hand, it may be reasonably construed from the Board's many decisions dealing with these types of cases, that the presence of union activity alone does not prove a complainant's allegations that the Act has been violated when that situation contemporaneously with an employer's impugned activity.* When an employer has put forward a credible explanation for those actions, apparently free of anti-union motive, there must be other evidence which either proves the presence of an anti-union motive or from which the Board may reasonably infer the presence of such motive.

(emphasis added)

6. If the majority view is correct, it would be virtually impossible to exclude any employees from reinstatement because, with minor exceptions, all were implicated in the strike and involved in picket line activities. There is no evidence to indicate that the company singled out Scott for particular animus – all who were convicted of civil offences were repugnant to the employer, which is understandable in view of the violence ("probably the most violent strike in 11 years" – Floyd), the damage from vandalism, which was variously estimated to be in or near the million-dollar range, and the threats and attacks against customers and company personnel. Is it possible for any employer to be free from bias in face of such lawlessness? The company showed its good faith in meeting the union halfway in the settlement, and the union, too, demonstrated a spirit of compromise. To single out Scott as the particular target of the company simply is not supported by the evidence.

7. It would seem incontrovertible that the complainants have found themselves in their present dilemma, not because of any anti-union motives, but because they put themselves beyond the protection of the Act in their illegal activities. In the "trade off",

which finally became necessary to settle the strike and reach a memorandum of agreement, the complainants found themselves without employment. The company and the union could not reach any other compromise.

8. Scott was fully aware of developments. He was present when the offer of settlement was conveyed to Floyd, and he took the signed offer back to Cass. Moreover, he was present at the ratification meeting, and his evidence was, that while he did not advise the others to sign, he did say: "This was the situation".

9. I would find that Scott's complaint fails.

0205-82-R Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), Applicant, v. **MacLeans Magazine**, Respondent

Practice and Procedure – Practice not to include evidence in officer's report where parties settle dispute as to witness' status prior to issuance of report – Board confirming practice – Indicating procedure to be followed where party desiring evidence to be considered

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Naomi Duguid, Linda Torney and Nick Jennings for the applicant; M. Patrick Moran and Charles Lee for the respondent.*

DECISION OF THE BOARD; December 24, 1982

1. This is an application for certification in which the applicant has applied for a bargaining unit described as "all employees in the Editorial Department of MacLeans Magazine save and except the Editor, Deputy Editor, Managing Editor, Assistant Managing Editor, Senior Editor, Editorial Controller, and the secretaries to the Editor, Deputy Editor and Managing Editor, and employees regularly employed less than twenty-four hours per week and students employed during the summer vacation period. For clarity, the unit applied for includes all full-time employees currently assigned to the Ottawa, British Columbia, Alberta, Atlantic Provinces, Washington, and New York Bureaus of MacLeans Magazine". In a decision dated May 25, 1982 in this matter, another panel of the Board directed that an interim certificate be issued to the applicant, pursuant to section 6(2) of the *Labour Relations Act*, for "all employees of the respondent employed in the editorial department of MacLeans Magazine in the Municipality of Metropolitan Toronto save and except Associate Editors and all those at and above the rank of Associate Editor, Chief of Research, Librarian, Editorial Controller, Assistant Art Director, Assistant Editors, Assistant to the Editor, secretaries to the Editor, Deputy Editor and Managing Editor, Editorial Assistant (Al Campoli), British Columbia Bureau Chief, Alberta Bureau Chief, Washington Bureau Chief and

New York Bureau Chief, Contributing Editors in Toronto (C. Rodd, P. Olendorf and D. Livingston), persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation.” The Board also appointed a Labour Relations Officer “to inquire into and report back to the Board with respect to (a) the appropriateness of the bargaining unit as it pertains to employees located in Ottawa (i.e. a province-wide unit); (b) the appropriateness of the bargaining unit in relation to bureaus located outside of Ontario; (c) the terms and conditions of employment of persons whom the parties do not agree are employed for not more than twenty-four hours per week; (d) the duties and responsibilities of those employees alleged by the respondent to exercise managerial functions or to be employed in a confidential capacity in matters relating to labour relations; and (e) those persons claimed by the respondent to constitute independent contractors”. (In the decision dated June 23, 1982, that panel of the Board directed the issuance of a second interim certificate, which covered “all employees of the respondent employed in the Editorial Department of MacLeans Magazine in the City of Ottawa save and except Bureau Chief and all those at or above the rank of Bureau Chief, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period”).

2. Pursuant to that appointment, several meetings of the parties were convened by a Labour Relations Officer (hereinafter referred to as the “Officer”). The first individual examined at those meetings was the respondent’s Art Director, Nick Burnett. Although the primary focus of his examination by the Officer would undoubtedly have been the duties and responsibilities of his own classification, it was common ground between the parties that Mr. Burnett was also questioned by counsel for the applicant and counsel for the respondent about the duties and responsibilities of the respondent’s Assistant Art Director, John Agnew. Following the examination of Mr. Burnett and certain other individuals in disputed classifications, the parties reached agreement on a number of matters, including the exclusion from the bargaining unit of the classification of Art Director. Subsequently, examinations were conducted of persons occupying various other classifications which remained in dispute, including Assistant Art Director, and the Officer’s Report (hereinafter referred to as the “Report”) was issued to the parties in due course. In accordance with the usual practice in such matters, the evidence of Mr. Burnett (and of each of the other persons who was examined by the Officer, but whose respective classifications were no longer in dispute at the time of the issuance of the Report as a result of the aforementioned agreement of the parties) was not included in the Report.

3. Upon receipt of the Report, counsel for the respondent requested that it be amended to include the evidence of Mr. Burnett. That request was opposed by the applicant. At the hearing scheduled by the Board for the purpose of hearing the representations of the parties with respect to the Report, counsel for the respondent reiterated his request that the Report be amended to include Mr. Burnett’s evidence. In support of that request, he submitted that the evidence which Mr. Burnett gave concerning the duties and responsibilities of Mr. Agnew is relevant and material to the issue of whether Mr. Agnew’s classification should be included in or excluded from the bargaining unit. In response to the assertion by counsel for the applicant that Mr. Burnett should have been called as one of the respondent’s witnesses in the examination proceedings before the Officer if the respondent wished to have his evidence concern-

ing Mr. Agnew's duties and responsibilities included in the Report, counsel for the respondent asserted that it would have been redundant to call Mr. Burnett as a witness for the respondent in view of the fact that Mr. Burnett had already given evidence before the Officer concerning Mr. Agnew's duties and responsibilities. Counsel for the applicant, on the other hand, contended that the respondent's failure to call Mr. Burnett as a witness, or to at least indicate that it sought to rely on Mr. Burnett's initial evidence at a time when the applicant was in a position to call reply evidence in response to that evidence, precluded the respondent from placing Mr. Burnett's evidence before the Board in this matter.

4. Where parties reach agreement concerning the inclusion in or exclusion from the bargaining unit of a classification after the person (or persons) in that classification has been examined in proceedings before an Officer, that person's evidence is not included in the Officer's Report for at least two reasons. In most instances, much if not all of such evidence would no longer be relevant to the matters in dispute between the parties. The primary focus of such evidence is invariably the witness's own duties and responsibilities, since it is only those duties and responsibilities which the Officer seeks to explore in his examination of the witness (although questions put to such witness by counsel sometimes, as apparently happened in the present case, extend somewhat beyond those duties and responsibilities to the duties and responsibilities of someone with whom the witness has frequent contact in the workplace). A second reason that such evidence does not form part of the Report is that the potential elimination of such evidence from the record is a factor which counsel can and do take into account in deciding whether or not to reach agreement concerning the inclusion or exclusion of the classification occupied by the witness. Knowledge that such evidence will not form part of the Officer's Report if the parties agree to include or exclude the disputed classification can be a significant factor which promotes settlement of such disputes. Thus, if a party were permitted to reach agreement on a particular classification and then to subsequently rely upon the evidence given by the person in that classification notwithstanding that agreement, the Board's settlement process could be impaired. Moreover, the change in the Board's practice advocated by counsel for the respondent would introduce an element of uncertainty concerning whether such evidence would or would not form part of the Report. Such uncertainty would tend to discourage settlements, and could also needlessly introduce a potential source of further controversy between parties who have reached agreement concerning the inclusion or exclusion of a disputed classification.

5. For the foregoing reasons, the respondent's request that the Report be amended to include the evidence of Mr. Burnett is hereby denied. However, in view of the fact that the Board's practice in such circumstances may not heretofore have been generally known, as it is not set forth in any practice note or in any previous Board decision that has been brought to our attention by counsel or by the Board's independent research, the Board, in the circumstances of the present case, will permit counsel for the respondent to call Mr. Burnett as a witness at the continuation of the hearing of this matter, to testify before the Board concerning the duties and responsibilities of the respondent's Assistant Art Director. If counsel for the respondent elects to call Mr. Burnett, the Board will afford counsel for the applicant an opportunity to cross-examine Mr. Burnett and to call reply evidence in response to Mr. Burnett's evidence. However, the publication of this decision should eliminate the need for the Board to permit such

evidence to be called before it in future cases. Having been made aware of the Board's practice in such matters through this decision, a party which desires to place such evidence before the Board in a future case should do so by calling the individual as a witness before the Labour Relations Officer, or by obtaining the agreement of the other party (or parties) that the evidence previously given by that individual is to be included in the Report notwithstanding the fact that the classification occupied by that individual is no longer in dispute. In the absence of such agreement, that evidence will not form part of the Officer's Report to the Board.

6. There is also a second procedural matter requiring determination by the Board at this time. As noted above, the applicant seeks to have the respondent's Ottawa, British Columbia, Alberta, Atlantic Provinces, Washington, and New York Bureaus included in the bargaining unit. In view of the respondent's opposition to their inclusion, the aforementioned Officer's appointment included the power to inquire into "the appropriateness of the bargaining unit in relation to bureaus located outside of Ontario". However, the Officer was unable to complete his inquiry into that matter for reasons set forth in the following passage of the Report (at page 3):

"At the meeting of July 28th, 1982 the issue of our appointment to inquire into and report to the Board on the appropriateness of the bargaining unit in relation to Bureaus located outside Ontario was raised and thoroughly discussed as to the method of dealing with the matter. Since this was the last outstanding issue to be dealt with and having regard for the discussions with the parties the following ruling and subsequent comments were put into the record on tape.

L.R.O. – In regards to the Board's direction to inquire into and report to the Board on the appropriateness of the bargaining unit in relation to the Bureaus located outside of Ontario, it has been brought to our attention that the respondent has stated that it feels the Board does not have jurisdiction over those Bureaus outside the Province of Ontario and further to this the applicant has stated that it feels that it would be necessary to call the individuals located in those Bureaus to decide the question not only of jurisdiction but also of the appropriateness of the bargaining unit. The respondent has indicated that it is unwilling to produce those people from the Bureaus located outside the Province of Ontario for examination. Therefore, the Labour Relations Officer defer [sic] to the Board on that question.

L.R.O. – Do the parties have any submissions that they want to make in regards to that issue. Naomi? Patrick?

Applicant – No. Not at this time.

L.R.O. Patrick?

Respondent – Not at this time."

7. At the hearing of this matter, counsel for the respondent submitted that the Board has no jurisdiction to include the aforementioned Bureaus (with the exception of the Ottawa Bureau) in the bargaining unit, and has no jurisdiction to compel the respondent to produce before the Board or before an Officer, the persons who work in the Bureaus located outside of Ontario. Although counsel for the applicant conceded that the Board does not have power to subpoena any of the Bureau personnel who are beyond the boundaries of the Province of Ontario, she contended that the Board can nevertheless direct the respondent, who seeks their exclusion, to produce them for examination. She also noted that Jane O'Hara, the individual who was stationed in the respondent's New York Bureau at the time of the application, has since returned to Toronto and is, therefore, susceptible to being subpoenaed by the Board. In response to those submissions, counsel for the respondent contended that the Board does not have jurisdiction to direct the respondent to produce any of the extra-provincial Bureau personnel, including Ms. O'Hara, as the Board cannot do indirectly (through an order that the respondent produce certain persons) what it cannot do directly (namely, subpoena the individuals in question).

8. Having carefully considered the submissions of the parties concerning that matter, the Board is of the view that before embarking upon any inquiry as to whether the Bureau personnel exercise managerial functions within the meaning of section 1(3)(b) as alleged by the respondent, or as to the appropriateness of including them in a bargaining unit with the respondent's Metropolitan Toronto editorial department personnel, the Board should hear the evidence and submissions of the parties with respect to the threshold issue of whether or not the Board has (territorial) jurisdiction over any of the Bureau personnel in question. Therefore, at the continuation of hearing of this matter, the Board will afford counsel for the applicant and counsel for the respondent an opportunity to present evidence and argument concerning that jurisdictional issue. With respect to the issue of whether Ms. O'Hara can be subpoenaed to testify in these proceedings, the Board is of the view that there is no merit in the submission by counsel for the respondent that she cannot be subpoenaed because, at the time of the application, she was working in the New York Bureau and was accordingly at that time beyond what counsel for the applicant concedes to be the geographical range of a Board subpoena. Having returned to Ontario, Ms. O'Hara can undoubtedly be subpoenaed by the applicant to testify before the Board concerning issues of fact which are material to our determination of the legal issue of whether the respondent's Bureau personnel are within the jurisdiction of this Board.

9. This matter, which has already been scheduled for continuation of hearing on January 19 and 31, and on February 8 and 9, 1983, is referred to the Registrar.

DECISION OF BOARD MEMBER J. A. RONSON;

1. I believe that this is the first time the Board has had the opportunity to elaborate on a practice or a procedure with regard to certain evidence taken before a Labour Relations Officer. Since the practice is peculiar to the Board (and appears to differ substantially from the rules of civil procedure) I would hope to see a practice note issued bringing the procedure to the attention of counsel and the public.

2. Stated briefly, if a party wishes to use the evidence of a witness in regard to the employment status of another person, then that witness must be produced or called as a witness by the party. Now in many cases the Board examines persons whose own status is in dispute. If, subsequently, that person's status is no longer in issue, and a party wishes to use his or her evidence with respect to the status of another person then said party must get the consent of all interested parties in order to have the relevant evidence transcribed. If consent cannot be obtained, then the party must recall the person as its own witness to the proceedings, in order to place the relevant evidence before the Board.

3. Hopefully, this procedure will not result in inconsistent statements from witnesses and the attendant problems of hostile witnesses having to be dealt with by the Board.

0839-82-R; 0840-82-U Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, Applicant, v. **Manor Cleaners Limited**, Respondent, v. Group of Employees, Objectors

Certification Where Act Contravened - Discharge for Union Activity - Evidence - Interference in Trade Unions - Unfair Labour Practice - Board policy on affidavit evidence where witness unavailable - Speeches made to captive audience not protected by free speech provision - Lay-offs tainted by unlawful motive - Whether union had completed campaign prior to employer violations - Whether membership support adequate for certification without vote

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members L. Hemsworth and B. L. Lee.

APPEARANCES: *P. J. Falzone, F. J. Da Silva and Vincent Knapp for the applicant-/complainant; Keith G. Pedwell, Gino Marchionda, Andy Pontello, Margaret Pontello, Mary Jane McCallum, Maria Mastrangelo and Laxmi Badiani for the respondent; Dan Toppari for the objectors.*

DECISION OF THE BOARD; December 8, 1982

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

• • •

3. This is an application for certification, in which the applicant sought to be certified pursuant to Section 8 of the *Labour Relations Act*, which has been consolidated with an application pursuant to section 89. Both applications allege breaches of

sections 64, 66(a), (b), (c) and 70 of the Act and rely on the same particulars of misconduct. By a previous decision of a differently constituted panel on August 25, 1982, it was determined that the applicant had filed membership support for 9 out of the 25 employees in an agreed bargaining unit, and therefore could not be certified unless it could succeed under section 8. A hearing was held in St. Catharines on October 4, 5 and 6 to allow evidence and argument to be presented on whether the Board should in this case exercise its discretion under section 8 and whether any of the relief sought under section 89 should be granted.

4. At the outset of this hearing counsel for the objectors sought and received leave to withdraw from the proceedings on the basis that there would not be a vote in any event and therefore his presence was redundant. The issue of whether the petition circulated and signed by these employees is voluntary is not before the Board.

5. The respondent operates a retail and rental dry cleaning operation in St. Catharines. The alleged violations relate to two events – a meeting held on Monday, July 26, 1982, and layoffs of three employees effected July 30th.

6. The evidence given by the various witnesses called by the respondent has led the Board to conclude that there was an unusual meeting held at about 2:30 p.m. Monday, July 26th, in the lunch room of the respondent's premises. It was acknowledged by Andy Pontello, Vice-President and one of the three shareholders of the respondent, (hereinafter referred to as "Mr. Pontello") that a meeting with employees where all three shareholders of the respondent were present had not occurred for "quite a while ... a year or so". One of the respondent's own witnesses, an employee of some 20 years discontinuous employment and 2 years continuous employment, couldn't remember such a meeting with employees ever having occurred with all three shareholders present. The purpose of the meeting was to respond to information Mr. Pontello and Gino Marchionda, Secretary-Treasurer and shareholder, (hereinafter referred to as "Mr. G. Marchionda") had received from numerous sources the previous day which led them to believe that their employees were the subject of a union organizing campaign. Mr. Pontello and Mr. G. Marchionda met with Chris Marchionda, Gino's brother, President and the third shareholder of the respondent, (hereinafter referred to as "Mr. C. Marchionda") on Sunday afternoon and Monday morning to discuss what should be done. After no less than three separate meetings on Sunday and Monday morning among them, and after consultation with their lawyer to determine whether they could lawfully meet with their employees regarding the union organizing campaign, it was decided that a meeting should take place wherein Mr. G. Marchionda would be the chief spokesperson, Mr. Pontello would "wrap up" and Mr. C. Marchionda would remain silent.

7. Much evidence was led by the respondent as to why the meeting was called, the majority of it devoted to describing Mr. Pontello's and Mr. G. Marchionda's apprehension that the employees were being visited during the previous weekend by persons identifying themselves as being from the Ontario Labour Relations Board. The Board is satisfied that while it may have been that part of the incentive to have the meeting arose from a desire by the three shareholders to correct employees who might be under an incorrect belief that they were being canvassed by Ontario Labour Relations Board personnel, the main purpose was to communicate to their employees

the consequences of opting for a union and to dissuade them from doing so. Mr. G. Marchionda testified that "we wanted them to know that we didn't want a union". The format of a meeting was chosen to communicate this message instead of a written statement. Both Mr. Pontello and Mr. G. Marchionda admitted that many employees at the meeting didn't understand English too well, and on other occasions when they were expressing their opinions to these employees, "you got to use your hands" to communicate. Mr. Pontello pointed out that some people wouldn't have understood a written statement and yet they "seemed to" understand the meeting because "in communicating with a person you can change your vocabulary ... by talking directly we can change the vocabulary so a person can understand".

8. Mr. C. Marchionda prepared on paper an agenda of points he wanted to cover and used this piece of paper at the meeting. From the respondent's own evidence it appears Mr. G. Marchionda emphasized that Manor was a "family affair" or "more like a family than a business" and because of the resultant closeness the employees didn't require a union. He went on to say that the union would necessarily change the relationship because it was a "third party". While he expressed the intention to try to maintain the style of management he had been using for 15 years without the presence of the union, he warned that with the union it may not be the same. He made mention of the fact that Government regulations only require 10-minute coffee breaks and 20-minute lunch breaks, whereas at Manor the employees could take 15-minute coffee breaks and 30-minute lunches. He indicated that a 10-minute break wouldn't allow sufficient time for them to go to a nearby donut shop which apparently was a practice of some or all of the employees. Under cross-examination he acknowledged that by mentioning this he may have left the impression with his employees that with the union they would only receive 10 minutes, but "it was not what (he) intended". However, he did state that one of the reasons he mentioned it was the fact that the business was a "family affair" and it is recognized by the respondent that taking a coffee break at the donut shop takes more time than 10 minutes. Mr. G. Marchionda's wife, Leona, (hereinafter referred to as "Mrs. Marchionda") who was described "to act like a manager" without anyone having even appointed her as such, was standing at a long table beside her husband, Mr. Pontello and Mr. C. Marchionda. Mr. G. Marchionda testified that he heard her ask Joyce Langohr more than once whether she had joined the union. At some point other employees stated that they had joined the union, with some claiming they hadn't understood why they did. It is not clear how these admissions came about. Mr. G. Marchionda and Mr. Pontello testified that Debbie Harrison, an employee, caused these confessions by admitting she had signed a card. Mr. G. Marchionda specifically denied asking Harrison at the meeting whether she had joined the union. Mrs. Marchionda did not testify.

9. At the end of Mr. G. Marchionda's agenda and after all the "girls" began talking aloud, Mr. Pontello, as planned, "wrapped up" the meeting by stating that if they wanted to have a union, that was "fine". He pointed out that they were free to join or to not join the union and that, it being a free country, they could do what they wanted. Mr. G. Marchionda's description of what Mr. Pontello said was to the effect that since it was a free country, the employees had a right to a choice of a union and therefore they didn't have to be "stuck with a union".

10. This meeting was called by either Mrs. Marchionda or Mr. G. Marchionda mid-afternoon on a work day normally terminating at 4:30 p.m. or slightly earlier

during the summer months. Employees were paid for the time they were in attendance. For some it was their break, and for others it was not. While evidence was led that employees were asked whether they would "like" to come to a meeting downstairs in the lunchroom, the Board is satisfied that in the circumstances there would be some degree of expectation that the employees respond positively to the invitation. In such a small group of employees the absence of one of them could be noticed. By the respondent's own count, 20 out of the 25 employees in the bargaining unit were present. Some of the missing ones were those employees necessary to serve the counter who remained upstairs. At least one of the 5 missing did not work on the premises, and at least one other was a driver. Mr. Pontello acknowledged that some employees were upset by the meeting, while Mr. G. Marchionda testified that, in his view, employees were not upset but only "concerned" about what they had done by signing a union card. Both admitted that for a period of time following the meeting, the atmosphere at the plant was not the same for a period from a few days up to a week. Normalcy had, in their estimation however, returned. The evidence of Joyce Langohr, the applicant's principal witness who gave testimony under subpoena, was that she herself was "scared to say she (had) signed" at the meeting; but under repeated questioning from Mrs. Marchionda, finally admitted that she had signed. The evidence of Joanne Routhier, another witness of the applicant, while more sketchy than Ms. Langohr as to detail, conveyed the strong impression that the meeting of Monday was not one she had wished to remember. In cross-examination regarding its contents, in explaining her lack of recall she said that "we tried to block it out". She elaborated in re-examination that this blocking-out occurred because the meeting had been very upsetting, and while there had been a previous "good atmosphere", this no longer existed. Another witness called by the applicant indicated that she also couldn't remember too much about the meeting, and when questioned in cross-examination as to whether she felt intimidated, said she didn't.

11. It is undisputed that this meeting took place after a weekend of active organizing by the applicant. Two employees of the respondent had contacted the applicant in June, and after approximately three weeks of planning and assessment by the applicant of the respondent's work force, active soliciting of members began on Friday evening, July 23rd. This was done on an employee-by-employee basis at their homes. By Sunday, July 25th, the applicant had signed 9 members. Evidence was given by the applicant's organizers that employees approached in the latter part of the weekend were told that 60% of the work force were members. Using the base of 15 employees in the bargaining unit, which the applicant did, the applicant believed this to be true.

12. The major points of discrepancy between what the respondent admits to have occurred at the meeting as described above and the applicant's evidence, largely but not exclusively given through Ms. Langohr, is that Mr. G. Marchionda said much more than he says he said, i.e.,

- (1) Mr. G. Marchionda asked everyone at the meeting who had signed for the union;
- (2) Mr. G. Marchionda indicated that the respondent's business would "go down" because he couldn't pay union wages, or that he couldn't afford to pay more than he was currently paying;

- (3) Mr. G. Marchionda indicated the coffee and lunch breaks would be reduced from 15 to 10 minutes and 30 to 20 minutes respectively;
- (4) Mr. G. Marchionda wrote down the names of persons who admitted to union membership on a piece of paper; and
- (5) Mr. G. Marchionda indicated that if the union got in, he might have to close down or people would have to go on strike because he couldn't afford higher wages.

13. In assessing these discrepancies, the Board has given no weight to the testimony of Debbie Harrison as contained in her two affidavits, one submitted by the respondent and the other by the applicant. The affidavit submitted by the applicant supports points (1), (3) and (4) and raises additional allegations regarding, among other things, the meeting. These additional allegations need not be elaborated because the applicant requested the Board to rely only on those portions "corroborative" of the testimony of the other witnesses called by the applicant. The affidavit submitted by the respondent conflicts with the affidavit offered by the applicant on point (1) only and, in addition, claims that "a previous affidavit was in short form and leaves out many of the pertinent facts". Whether the pertinent facts alleged to be left out of the affidavit submitted by the applicant are contained in the affidavit offered by the respondent is unclear. The applicant contended that in light of the preamble and section 103(2)(c) of the Act, together with section 15 of the *Statutory Powers Procedure Act* ("S.P.P.A."), the Board ought to exercise its discretion to receive and act upon those portions of the affidavit corroborative of any of the evidence led through *viva voce* testimony. The applicant submitted that the affidavit should be used to draw some conclusions about "credibility" but not to find "independent facts". The applicant offered the affidavit, along with a medical doctor's note dated September 29, 1982, to the effect that it was not in the best interest of Debbie Harrison in her physical and emotional condition at the time of the hearing to testify. Seeking to bring the best evidence possible in the circumstances and describing Debbie Harrison as a critical witness, the applicant sought and received a brief adjournment to obtain the affidavit now under consideration. Counsel for the respondent did not resist the Board's receipt and consideration of this affidavit, nor did he contest the note from Ms. Harrison's doctor, but rather contended that the Board should also receive the affidavit offered by the respondent, giving greater weight to the latter because of several factors. These factors amounted to counsel for the respondent giving evidence as to the preparation of the affidavits submitted by the applicant. It has long been recognized that the Board's powers to receive and act upon evidence are wider and more flexible than those of the Courts by reasons of Section 103(2)(c) of the Act and Section 15 of the *S.P.P.A.* (see *Beef Terminal Limited*, [1971] OLRB Rep. May 300). However, this difference should not be taken to indicate an absence of any standard or that the Board will or must receive and act upon any and all evidence offered to it. No absolute or definitive test has been or necessarily should be set down by the Board. The Board is not the first body to grapple with the creation of more flexible standards for the receipt of evidence where a witness cannot testify. The *Evidence Code* of 1975 published by the Law Reform Commission of Canada recommended, in section 29, new exceptions to the exclusion of hearsay in situations where a person is "unavailable" as a witness. Unavailability was broadly

defined to include a person “unfit by reason of his bodily or mental condition to attend as a witness” (section 29(2)(a)). Section 29(4) provides that notice of reliance on this exception must be given to allow the opposite party to argue about or lead evidence relating to probative value. Adoption of these provisos would expand significantly the current common law exceptions and allow the trier of fact to determine the *probative value* of the statement of an absent witness whose evidence has not been submitted to the rigours of cross-examination. The Report of the Ontario Law Reform Commission published in 1976 indicated that no amendment to the *S.P.P.A.* was necessary because it was satisfactory with respect to the admission of a statement of a witness which would otherwise be inadmissible as hearsay where the witness is too ill to testify. In his text entitled *Evidence in the Litigation Process* (Toronto: The Carswell Co. Ltd., 1978), Professor S. Schiff briefly deals with the issue of the treatment of hearsay by administrative tribunals at p. 293 by asking the following questions:

What criteria should govern boards and arbitrators in deciding when to admit and consider hearsay and when not? Should a major (if not the only) criterion be fair treatment of the party opposed to the evidence in the particular proceeding? Cannot a tribunal in some kinds of administrative proceedings treat that party fairly by admitting the hearsay and then allowing the opponent full opportunity to introduce countering evidence? However, if the proceeding is designed primarily to settle a dispute between adversary parties, can the opponent of hearsay evidence on a central issue be treated fairly except by exclusion?

Having considered these material, it appears clear that allegations of breaches of the Act raise a dispute between adversaries. The proper approach in these circumstances is to determine whether the evidence has any probative worth and whether the prejudice to the other party, adverse in interest, is so great that only exclusion will safeguard the interests of fairness. Employing this approach, there is little, if any, probative worth in both the affidavits and, in any event, it would not be fair to resolve any “credibility” issues by resorting to an affidavit of a person who has not given her evidence *viva voce* and therefore has not been submitted to cross-examination. Demeanour, an important component in the assessment of credibility in this and all cases, would be missing. For these reasons the Board is not prepared to rely on either affidavit to resolve the discrepancies noted above.

14. The Board has concluded that it is unlikely that Mr. G. Marchionda actually, in so many words, indicated that the coffee and lunch breaks would be reduced, or that his business would cease to operate because he couldn’t afford to pay union wages. The mention of coffee and lunch breaks was however made in such a way as to communicate the realization that the length of the breaks and other unmentioned privileges wouldn’t necessarily continue as they were if “a third party” was introduced into the “family affair”. As for the impact a union would have on the respondent’s business, all three witnesses called by the applicant, two of whom appeared very reluctant to remember the details of the meeting, testified that Mr. G. Marchionda said words to the effect that “we’re a small plant and we really can’t afford the union”. The Board finds that he thereby implied a cessation of operations. Mr. G. Marchionda categorically denies having asked anyone at the meeting whether he or she had signed a

card. He admits that his wife, an apparent part of the management team, did ask at least Joyce Langohr repeatedly whether she had joined the union. As has been pointed out earlier, it is unclear as to how the various confessions by other employees of their union membership came about. It may have been Mrs. Marchionda who asked the others, it may have been that her questioning of Ms. Langohr was an example to others and she did not have to ask further, and, of course, it may have been a spontaneous outburst. Mrs. Marchionda may have been able to explain this, but she was not called to testify. The Board has come to the conclusion that the information as to union membership was elicited in some fashion by her directly or indirectly and by the general atmosphere created at the meeting. As for the allegation that Mr. G. Marchionda wrote down names of those acknowledging membership, it is unlikely that this took place considering the small number of employees and the closeness of the group. It is probable that the piece of paper upon which the agenda was written was confused with a paper upon which such a record would be kept. Nevertheless, in such a small group of employees, whether the respondent recorded names of those admitting to union membership is of little significance, because their identity could easily be retained mentally.

15. On this basis, the Board has concluded that sections 64 and 66(c) of the Act have been violated. While section 64 permits an employer the opportunity to express his views, this must not be done in such a way as to amount to "undue influence". The Board has explained the meaning of these words at paragraphs 34 and 35 of *K Mart Canada Limited*, [1981] OLRB Rep. Jan. 60:

34. The Act protects the right of an employer to express its views about the representation of its employees by a union. The very scheme of the Act contemplates that union and employer will be opposed in interest. There is nothing in the Act that restricts or makes illegal an employer's predisposition to remain union free. An employer is free to communicate its feelings in that regard so long as it does not do so in a way that brings intimidation, coercion or undue influence to bear on its employees. Section 56 (now s. 64) of the Act provides:

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

35. In *Words and Phrases Legally Defined* (London, 1970) undue influence is defined in part as:

"The unconscientious use by one person of power possessed by him over another to induce the other to enter into a contract."

In the context of *The Labour Relations Act* undue influence includes the unconscientious use by an employer of its power or authority over employees in order to induce them to forego their rights in relation to a union. An employer exerts undue influence on its employees, and thereby breaches the Act, when it takes unfair advantage of its position and authority in an attempt to sway the will of the employees. The line between legitimate employer expression and undue influence is not easy to draw in the abstract, and can only be assessed on a case by case basis.

The speeches given by Mr. G. Marchionda and Mr. Pontello on company time and under the conditions noted above created a “captive audience” situation as that term is understood in labour relations (see *Clark Bros.* (1946) 90 NLRB 802 and generally, Adell, *Employer “Free Speech” in the United States and Canada* (1966) at p. 5; both cited in *New Ontario Dynamics Ltd.*, [1975] OLRB Rep. Nov. 845 at p. 851. In expressing his views, whether by means of a meeting or written communication, the employer must guard against using his power over the employees’ economic situation to unfairly influence the latter’s thinking. The classic statement of the balance which must be struck between the components of section 64 was delivered in *Bell & Howell Ltd.*, [1968] OLRB Rep. Oct. 695 at p. 704:

In this regard, it is important to appreciate the sensitive nature of the relationship that exists between employees and their employer. The Board succinctly expressed both the nature and the effect of that relationship in the *Pigott Motors (1969) Limited* case, C.L.L.C. Vol. 2, 1960–1964, ¶16,264 at p. 1130 in the following words:

In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.

At paragraph 22 of the *Bell and Howell* decision the Board elaborated as follows:

22. In the *Taggart Service Limited Case*, (1964) C.L.C.R. Transfer Binder ’64–’66, ¶16,015 at p. 13,055, the Canada Labour Relations Board made the following statement regarding an employer’s right to express his views, with which we are in accord:

An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However, he should bear in mind in so doing the force and weight which such expressions of views may have upon the minds of his employees and which derive from the nature and extent of his authority as employer

over his employees with respect to their wages, working conditions and continuity of employment. He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of intimidation, threats, or other means of coercion to interfere with their freedom to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.

The meeting was highly unusual and highly charged with emotion for some, if not all. While Mr. G. Marchionda and Mr. Pontello were careful to proclaim the employees' right to join or not to join a union, the real message they communicated, albeit by a subtle means, was delivered, i.e., joining the union was an act of disloyalty against the family, and past indulgences, such as longer breaks than the law required, would be lost if the "family affair" was destroyed or changed by the introduction of a "third party". The employees were in all probability left with the impression that a third party would necessarily change things and the way the plant was operated. We accept the evidence of the applicant's witnesses that Mr. G. Marchionda said words to the effect that he couldn't afford to pay union wages, leaving the impression that the business would be in jeopardy if the union was successful. For those employees who could not understand all of the English spoken, a message was delivered through the fact of the meeting itself: it could not have been missed that a very important matter necessitated all three owners of the plant meeting with the employees on short notice. The content and timing of the meeting was intended to, and did amount to an interference with the selection of a trade union contrary to section 64, and the respondent used undue influence over employees being organized by the applicant. The Board has also concluded that the meeting was a means by which the respondent sought to compel its employees to refrain from becoming or cease to be members of the union contrary to section 66(c).

16. The evidence regarding the layoff of three employees reveals that this decision to lay off was not made by the principals of the respondent until Wednesday, July 28th, and the three employees affected were informed of their layoff at or around 4:30 p.m. on Friday the 30th of July. The respondent contends that the only reason for the layoff was a cyclical downturn in the retail dry-cleaning side of the respondent's business. In Mr. G. Marchionda's words, "the lack of work (at this time) was not new" occurring twice yearly in February and in the summer period. Production and poundage figures were produced which showed that the poundage (which, according to Mr. G. Marchionda, is the truest indicator of how busy it was) in retail dry-cleaning declined by half between the week ending May 29 and the week ending August 7, whereas the number of employees and hours of work only decreased (presumably through the layoff) by 25%. In the face of such decline, Mr. G. Marchionda and Mr. Pontello decided to effect the layoff. According to them, the three employees were selected solely on the basis of their length of service and skills. The three employees laid off were Joyce Langohr, Maria Mastrangelo and Ruth Gonzales. Ms. Langohr was a dry cleaner's helper, doing unskilled labour which had been formerly done by Mrs. Marchionda along with her other duties as dry cleaner; Mrs. Mastrangelo was a presser and finisher, and Ms. Gonzales was a "floater", not doing any particular job exclusively. It was clear that Ms. Langohr was not the most junior in the plant. Dorothy

Franco had worked at Manor Cleaners less time, but was not laid off because she could work on the counter while Ms. Langohr, by her own admission, could not. The reason why Edith, another employee hired after Ms. Langohr, was not laid off has been left unsatisfactorily explained. Maria Mastrangelo, who had 2 years continuous service, had more seniority than Dorothy and Edith, but the least amount of seniority in her department. On this occasion it was decided to lay her off rather than disturb other departments. The reason for this choice was left unsatisfactorily explained. As for Ms. Gonzales, it appeared that she was the last person hired and the respondent could get along without a floater. Mr. G. Marchionda professed at one point to have known of Ms. Langohr's and Ms. Gonzales' trade union activity only through an "investigator" from the Board subsequent to the layoffs and believed that Mrs. Mastrangelo had engaged in no trade union activity. We find this disclaimer hard to believe in light of Mr. Marchionda's subsequent testimony under cross-examination that he heard his wife ask Ms. Langohr more than once whether she had joined the union. We find that in response to this questioning Ms. Langohr answered in the affirmative and it stretches credulity that Mrs. Marchionda would not have informed her husband as to the answer, if indeed he did not hear it for himself. We also find it hard to credit his testimony that he didn't know whether Maria Mastrangelo had joined the union in view of the fact she testified she had said at the meeting on Monday that she had joined the union, and when she had told "(this) truth (she) felt better and the bosses felt better"; and again, it would be surprising that Mr. G. Marchionda would not have heard this confession or would not have been told of this by the "bosses" who appeared relieved. In any event, the decision to lay off appears to have been a joint one, at least as between Mr. G. Marchionda and Mr. Pontello, and again it stretches credulity that one of them would not have heard or have known of Mrs. Mastrangelo's membership in the applicant. As for Ms. Gonzales, we accept Ms. Langohr's evidence that she was among those who confessed at the meeting to having joined the union and in all probability would have been heard doing so by one of the owners.

17. As for the timing of the layoff, the respondent has not satisfactorily explained why, if the downturn in business was a cyclical, almost predictable event, the decision to lay off was not made until two days before the layoff. While, arguably, it is understandable that an employer may wish to postpone *informing* employees of a decision to lay off until the last moment and to pay money in lieu of notice to avoid sabotage, ill feeling and to retain employees as long as they are needed, the proximity between knowledge of trade union activities and the *decision* to lay off cannot be explained simply in those terms. The Board, with judicial approval, has held that if an employer's actions are motivated, even in part, by anti-union considerations, the employer is in violation of the Act, notwithstanding existing legitimate business reasons (*Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577, affirmed by Divisional Court 80 CLLC ¶14,602). While there may have been some business justification for the layoffs, the Board is satisfied that the respondent was motivated in part by a desire to show those laid off and other employees that the continuation of their employment was dictated by the respondent and support of the union could be an adverse factor. It makes no difference to this determination that the employees, when laid off, were advised that their probable length of layoff would be about 1½ months and that they all had returned to work after this space of time had elapsed. The temporary loss of income and the uncertainty of their date of return are potent in and of themselves to constitute breaches of the Act.

18. For all of these reasons the Board is satisfied that the respondent, in laying off Joyce Langohr, Ruth Gonzales and Maria Mastrangelo, acted contrary to sections 64 and 66(a), (b) and (c).

19. In order for the applicant to succeed under section 8, it must establish three conditions, namely, that:

- (1) the Act has been violated;
- (2) the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained; *and*
- (3) in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining.

(emphasis added)

Having concluded that breaches of the Act have been established, questions become whether the second and third conditions are fulfilled and whether, even these having been proved, the Board should exercise its discretion (see *Skyline Hotel Limited*, [1980] OLRB Rep. Dec. 1811, at para. 65). The purpose of section 8 is aimed at redressing the rights of employees and their trade union when an employer has committed breaches of the Act so flagrant as to inhibit the ability of the employees to freely choose whether or not they wish to be represented by a trade union, be it by way of signing cards or by way of casting a ballot in a representation vote. (See *District of Algoma Home for the Aged (Algoma Manor)*, [1979] OLRB Rep. April 269; *Viceroy Construction Company, Limited*, [1977] OLRB Rep. Sept. 562; *Lorain Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734). Normally a violation inhibiting employees' ability to choose is where the job security of employees is threatened (see *Dylex Limited*, [1977] OLRB Rep. June 357; *Sommerville Belkin*, [1980] OLRB Rep. May 796; *A. Stork and Sons Ltd.*, [1981] OLRB Rep. Apr. 419; *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801; *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338). Section 8 was designed to eliminate a respondent's "reward" for breaches of the Act which have resulted in a depressed membership evidence such that so few cards were signed either that certification without a vote cannot occur or that a vote never could have been ordered in the first place (see *Skyline Hotel Limited*, *supra*, at paragraphs 61 and 62). Section 8 is not intended to be a "punishment" for the respondent (see *Radio Shack*, [1974] OLRB Rep. Dec. 1220), nor intended to allow an applicant to advance a campaign for members beyond its normal course (see *District of Algoma Home for the Aged*, *supra*).

20. As was noted at the outset, the applicant only filed membership support by 9 of the 25 employees in the bargaining unit. There were no lost cards. These figures show that 36% of the employees, after two days of campaigning by the applicant and prior to the employer's actions described above, wished to be represented by the applicant. If application had been made under section 9 for a pre-hearing vote, this would have undoubtedly been granted. In this case the applicant did not request such a vote because the evidence given by the applicant's organizers at the hearing and the documents filed by the applicant in support of its application (Forms 1 and 9) show

they were under a mistaken belief about the size of the unit and, consequently, about their support. The organizers testified that it was their belief that 9 employees represented 60% of the bargaining unit and therefore had not misrepresented anything in advising employees approached late Sunday that 60% of the employees supported the applicant. At the date of application, August 3, 1982, Form 1 shows that the applicant continued to believe that the bargaining unit consisted of approximately 15 employees, whereas on Form 9 the applicant claims there were 20 employees in the unit at the date of application. On the basis of 15 employees, the union held 60% and on the basis of 20 employees, 45%, the latter at least entitling the union to a representation vote. If this were an ordinary certification application and the applicant had discovered on the day of the hearing that in reality its support was 36%, it may well have chosen to withdraw the application and either applied for a pre-hearing vote or attempted more organizing in the hopes of getting the support above 55%. The latter would have required the signing of 4 more individuals. If there had been no violation, this is how matters could have proceeded and the employees would have had the ability to freely choose whether or not they wished to be represented by the applicant by either signing a card or by way of casting a ballot in a representation vote.

21. The issue of whether membership strength is adequate under section 8 has been found by the Board in prior cases not to be simply a question of numbers or percentages. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the Board stated at paragraph 22:

No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard for all the circumstances.

Some of the circumstances or factors which have been considered by the Board in assessing “adequacy” are:

- (1) the stage of the union’s campaign at which the employer conduct occurred (*Skyline Hotel Limited*, supra; *District of Algoma Home for the Aged (Algoma Manor)*, supra);
- (2) the circumstances surrounding the cards signed prior to the employer interference and the number of cards signed *Lorain Products*, [1977] OLRB Rep. Nov. 734);
- (3) the existence of a full-time unit which showed membership sufficient to support collective bargaining by its part-time counterpart (*Robin Hood Multifoods*, [1981] OLRB Rep. July 972; *Windsor Airline Limousine Limited*, [1981] OL Rep. Mar. 398);
- (4) the severity of the employer conduct insofar as it related to the number of cards signed – “the chilling effect” (*K-Mart*, [1981] OLRB Rep. Jan. 60);

- (5) the percentage of unit signing the cards where support for the union is at an extremely low level (5%) (*Sommerville Belkin*, *supra*).

In assessing adequacy the Board must engage in some measure of speculation regarding the union's prospects of successfully engaging in the sequel to certification, collective bargaining. If the union can and has mustered the totality of its support in the bargaining unit certification under section 8 should not be used to foist union representation on those employees who would not have chosen this freely for themselves. The assessment must be taken with care (see *Skyline*, *supra*, at paragraph 62).

22. Assuming, without deciding, that the union's campaign had concluded in accordance with its plans on Sunday, July 25th, it could be argued that the employer's conduct had no "chilling effect" at all the campaign since it was finished anyway. This is not a conclusive argument in the circumstances in view of the fact that the union could have, after realizing its mistake, conducted itself in the ways set out in paragraph 20. It could have continued or reopened its campaign whether toward the goal of obtaining additional cards or sufficient ballots. From this perspective the employer's unlawful activity occurred relatively early in the applicant's organizing efforts after only two days of active soliciting. Because the union, with the support it already had at the terminal date may have been able to achieve certification in the ways noted above, we are of the opinion that this support is adequate for collective bargaining. No evidence was led by the applicant from which the Board can conclude that the reason why no more cards were signed after Sunday was because of the "chilling effect" of the employer conduct – no evidence was presented as to any efforts to sign up employees being made past Sunday, July 25th. However, the campaign was not necessarily "spent" on this date and could have continued as outlined above; therefore, we must now assess whether, prospectively, the conduct of the respondent has interfered with the detection of the true wishes of the employees.

23. There is no question that the employer's actions between Monday, July 26th and Friday, July 30th, would have had an enormous impact on the bargaining unit. The most important economic power any employer has over its employees, job security was spoken of and resorted to by the respondent undoubtedly in response to the information that a union was attempting to organize its employees. The employees were told the respondent couldn't afford union wages clearly associating in the employee's minds either bankruptcy or cessation of operations with the advent of a union. Later in the week the respondent, in laying off certain employees, acted in such a way as to show most graphically that union supporters were risking the cessation of their own individual employment. It has been consistently recognized that these sorts of threats to an employee's job security in the course of a union's attempts to organize undermine the ability of employees to freely express their wishes regarding union representation in accordance with section 3 of the Act, either in a secret ballot vote or by signing cards (see cases cited in paragraph 19 above). Therefore, the Board concludes that the true wishes of the employees are not likely to be ascertained, even if the union were to further organize or apply for a vote.

24. The final question to be answered is whether the Board ought to exercise its discretion under section 8 and grant the applicant certification. As a part of this determination, the Board must assess whether any of the remedies it could grant under

section 89 would restore the atmosphere existing prior to the employer's wrongful conduct so that the employees are able to choose freely whether they wish to be represented by the applicant or not. The Board has decided to exercise its discretion to grant certification because it does not believe that even the extensive remedy it has drafted pursuant to its powers under section 89 is sufficient to restore the atmosphere existing prior to the respondent's actions during the week of July 26th and even with this extensive remedy, it is doubtful there is anything the applicant could say or do to eradicate the effects of the threats to the employees' job security. Also, since it appears that the respondent now has a rough idea of who joined the applicant, any further accretions in support in such a small group would be highly visible. The respondent led evidence in an attempt to show through its employees that the meeting was not intimidating and that the petition circulated was originated in a way untainted by management. These, of course, were subjective statements which the Board has not considered reliable. Rather, we have found that on a fair and objective evaluation, the effects of the events of the week of July 26th were detectable even up to the hearing date. Finally, notwithstanding that the issue of the voluntariness of the petition, originated and circulated following the July 26th meeting, is not required to be determined, the Board notes that in the atmosphere created by this meeting it would be unlikely that a petition could be considered by this Board to be voluntary.

25. For the foregoing reasons the Board therefore certifies the applicant, pursuant to the provisions of section 8 of the Act, as bargaining agent for:

All employees of the respondent in the City of St. Catharines, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, clerical and sales staff, drivers, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

26. A certificate will issue to the applicant.

27. The Board has found the respondent in breach of sections 64 and 66(c) of the Act in the conduct of the meeting of Monday, July 26th, and in breach of sections 64, 66(a), (b) and (c) in laying off Joyce Langohr, Ruth Gonzales and Maria Mastrangelo. Therefore the Board orders:

(a) That the respondent post copies of the attached notice marked "Appendix" in both English and Italian as supplied by the Board in equal numbers in conspicuous places on its premises; that such notices be posted for 60 days and that the respondent take all reasonable steps to ensure that the notices are not altered or defaced or covered by any other material; that reasonable access be given by the respondent to a representative of the applicant so that the union can satisfy itself that this posting requirement is being complied with.

(b) That at least two representatives of the applicant be given an opportunity to hold two separate meetings, the first of which will occur within two weeks of the receipt of this decision or at

a time satisfactory to the applicant with all employees, without loss of pay, on the respondent's premises during working hours but without the presence of any member of management. Each of these meetings may be as much as one hour in length. The second meeting will be held on the same fashion at a time satisfactory to the applicant. The applicant may, if it so desires, bring a person to these meetings for the express purpose of translating for employees who speak Italian. The respondent is ordered to make it a requirement of all employees to attend such meetings.

- (c) That the representative of the applicant will be provided reasonable notice of and access to any future meeting of employees sponsored by or called by the respondent which involves a discussion of the pros and cons of collective bargaining with equal time to be afforded the applicant's representative to respond.
- (d) That the respondent, at its own expense, send a copy of the Appendix in both English and Italian as supplied by the Board to the home address of each employee in the bargaining unit.
- (e) That the respondent provide the applicant forthwith with a list of the names and addresses of employees in the bargaining unit and keep the list updated from time to time as ordered by the Board.
- (f) That the three employees laid off receive compensation, benefits and credited service for the time they were laid off.

28. The Board will remain seized if there is any dispute as to the implementation of this decision.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

We have issued this notice in compliance with an Order of the Ontario Labour Relations Board issued after a hearing in which both the Company and the Union had the opportunity to present evidence. The Ontario Labour Relations Board found that we violated the Ontario Labour Relations Act and has ordered us to inform our employees of their rights.

The Act gives all employees these rights:

- To organize themselves;
- To form, join or help unions to bargain as a group, through a representative of their own choosing;
- To act together for collective bargaining;
- To refuse to do any and all of these things.

We assure all of you that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT intimidate or exert undue influence upon you, whether through meetings, individual conversations or otherwise, to prevent you from exercising your right to associate and participate in the lawful activities of a union.

WE WILL NOT lay off, discharge or threaten to lay off or discharge any employee because of that employee's union activity or sympathies.

WE WILL NOT in any other manner interfere with or restrain or coerce our employees in the exercise of their rights under the Act.

WE WILL comply with all directions of the Ontario Labour Relations Board.

WE WILL provide the Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (formerly Laundry, Dry Cleaning & Dye House Workers International Union Local 351) forthwith with a list of the names and addresses of employees in the bargaining unit and keep the list updated from time to time as ordered by the Board.

WE WILL provide representatives of the Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 access to our premises during working hours for the purpose of conducting two separate meetings of the employees in the bargaining unit out of the presence of any member of management.

WE WILL provide representatives of the Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 access, with reasonable notice beforehand, to any meeting of employees sponsored by us which involves the discussion of the pros and cons of collective bargaining, with equal time to be afforded the union representatives to respond.

MANOR CLEANERS LIMITED

Per:

(Authorized Representative)

is is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

ED this 8th day of December 1982

1304-82-R Hotel, Restaurant & Cafeteria Employees, Local 75, Applicant, v. Orangerooft Hotels Limited, Howard Johnsons Airport Hotel, Respondent

Bargaining Unit – Practice and Procedure – “Night auditors” excluded from existing agreements – Whether union may resile from agreement to exclude – Whether night auditors forming appropriate unit for new application – Board finding tag-end unit appropriate.

BEFORE: E. Norris Davis, Vice-Chairman and Board Members E.J. Brady and B. Lee.

APPEARANCES: *Alick Ryder Q.C. and Gerry Jones for the applicant; W.J.M. Hanson R. King and R. Copeland for the respondent.*

DECISION OF THE BOARD; December 14, 1982

1. This is an application for certification.

• • •

3. The board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The bargaining unit sought by the applicant would include two employees both of whom are classified as “night auditors”. The respondent’s submission is that if there is to be a unit it should comprise all the remaining employees as a “tag end” unit which would effectively expand the current number of employees to be affected to nine and, in addition to the Night Auditor classification, would also include persons classified as bookkeeper, reservations, sales and catering secretary, catering co-ordinator, two secretaries, and sales representative.

5. The parties are currently parties to two collective agreements which will run till November 1982. Collective bargaining relationships were first established in 1978 following Board decision in file 0182-82-R. As a result of that decision three bargaining units were found to be appropriate and may be generally characterized as an “all employee” unit, a “front desk office staff” unit, and a “part-time” unit. The latter unit is of no relevance to the present application: certificates were ultimately issued to the applicant following representation votes in respect to the other two units; and collective agreements ensued. The persons covered by the instant application, “night auditors” were excluded from the “all employee” unit certificate by agreement of the parties. In the “front desk office staff” unit a representation vote was conducted in which night auditors were not on the agreed voters’ list and the subsequent certificate makes no specific mention of that classification. In the collective agreements between the parties covering the “front desk office staff” unit the parties did specifically exclude “night auditors”.

6. It was the applicant’s argument that there had been some change in duties of the “night auditors” since the original certification, and that in the 1978 proceedings the

motivation for exclusion might have been because of the exercise of managerial functions. The record itself does not disclose the basis on which the parties agreed to exclude that classification from the "all employee" unit or in establishing the "front desk" unit voting list. The applicant now argued that night auditors had a community of interest with the "front desk" unit and that if it secured the right to represent them it might then be able to bargain them into that unit during current contract renewal negotiations: the applicant further argued that if the Board acceded to the "tag end" unit proposal of the respondent it would result in night auditors being combined with a group with whom there was little or no community of interest.

7. The respondent argued that the specific exclusion of night auditors from the bargaining unit in the collective agreement represents a concession bargained for in good faith and for which it must be assumed the company gave some *quid pro quo*. It is argued that the *Windsor Arms* case, [1981] OLRB Rep. Sept. 1313 rationale should lead to a conclusion that where the union has gained an unfair advantage and there has been prejudice to the employer, the Board should not now entertain the application and to enable the applicant to secure through the Board what it gave up in bargaining. It also argued that the Board should require the applicant to apply for the "tag end" unit and refers us to the cases of *Canadian General Electric Company Limited*, [1979] OLRB Rep. March 172; *McKellar General Hospital*, [1971] OLRB Rep. June 312.

8. The issue of the effect of an agreement entered into by a party before the Board on future applications made to the Board is the subject of a comprehensive examination in the Board's decision in the *Windsor Arms Hotel Limited* case, *supra*. The ramifications of the question are outlined in para. 12 of that decision where the Board said,

The issue posed by the respondent is a difficult one because there are many situations in which a union will obtain a certificate or avoid a representation vote because of the parties' agreement with respect to the status of disputed individuals. It smacks of abuse of process when a union agrees that certain individuals are not employees in one application, then asserts precisely the opposite in a later application. Whether or not a concept analogous to *res judicata* applies, and even if the agreement has not permitted a union to get a certificate or obtain some other concrete advantage, an agreement entered into by a party before the Board should have some substance, and it is arguable that it should not be swept away by the simple expedient of filing a second certification application. On the other hand, persons who are employees have a right to organize and bargain collectively. When there has been no formal determination of their status by the Board, why should they be prevented from being represented by the union of their choice? The employees in the instant case were not party to the earlier proceedings or agreement; and while such agreements are obviously desirable to avoid protracted litigation, an unduly rigid interpretation of their effect on future proceedings may pose as great an impediment to agreement as an approach which is too lax. In both cases, parties may be prompted to litigate the issue rather than agree. Moreover,

from an industrial relations point of view, there may be a real disadvantage of erecting any absolute bar. Employees who wish to engage in collective bargaining may simply seek out a new union – thereby fragmenting the bargaining structure and introducing two unions in a situation where, in all likelihood, collective bargaining stability and industrial peace would be enhanced if there were only one.

The Board went on to examine a number of decisions where the issue had been raised in section 95(2) applications and, in a lesser frequency, in certification applications. The Board, in ultimately concluding that it should entertain the application before it, said,

“There may well be cases where it is appropriate to hold a party to its earlier agreement, and decline to entertain a new application for certification – and this is especially so where the agreement is very recent and the union can be said to have gained an “unfair advantage”, or the respondent can demonstrate real prejudice. That is not the situation in the present case, however, and we are satisfied we should proceed with the application in its merits”.

9. In the instant case it is not represented that the agreement for non-inclusion of night auditors on the voting list of the front desk unit gave to the applicant an unfair advantage or caused prejudice to the respondent, but rather that the prejudice to the respondent arose out of the specific exclusion of that classification which had not been included in the Board’s certificate. As we read the *Windsor Arms* case, *supra*, the Board is concerned about the preservation of the integrity of its process and therefore, in a proper case, would not permit a party to resile from an earlier agreement made before the Board and which resulted in an unfair advantage to the applicant. In our view this is not the instant case and in any event it cannot be said that the events, after the conclusion of two collective agreements can be characterized as “very recent”. We are therefore satisfied that the application should be dealt with on its merits.

10. The Board must determine whether the unit proposed by the applicant is one which is appropriate for collective bargaining. In so doing we have a primary concern for the viability of it as a collective bargaining entity and must also look to the total operations of the employer to determine whether it will result in excessive fragmentation which, in itself, militates against collective bargaining stability. The applicant here did not argue strongly that the proposed unit was in itself viable but rather that a certificate might put the applicant in a position from which it could bargain the employees into an existing viable unit. Certainly following the issuance of a certificate the parties would have the authority to so agree. However the Board must make its decision on whether or not the unit now proposed is, in itself, one which is viable for collective bargaining independent of what future re-arrangements might be reached between the parties. The concerns which the Board holds in respect to the viability of the applicant’s unit together with the resultant fragmentation leads us to the conclusion that the appropriate bargaining unit in this case is a “tag end” unit. As said by the Board in the *Canadian General Electric Company Limited* case, [1979] OLRB Rep. Match 169 at p. 172,

In the process of organizing an employer's operation there may come a point when having regard to the extent of organization which has already taken place, the Board may decide that in order to avoid excessive fragmentation of the remnant group the appropriate unit is a tag-end unit encompassing the remaining unorganized employees with the possible exception of any remaining unorganized group(s) that the Board has traditionally recognized as constituting an appropriate unit. By the time an operation reaches a tag-end situation concerns for further fragmentation override the Board's usual insistence that employees in a bargaining unit share a community of interest. Consequently, in order to extend bargaining rights to a remnant group in the most beneficial way possible, the Board in those circumstances may find a bargaining unit appropriate which it might not have found appropriate at a less advanced stage or organization. (See *Ajax and Pickering General Hospital* [1972] OLRB Rep. May 477). In *The Greater Niagara General Hospital*, [1975] OLRB Rep. Jan. 16, the stationary engineers, service employees, nurses and technicians were already organized in four separate bargaining units at the time of application. In view of the bargaining structure in place, the Board denied the applicant's contention that the appropriate unit should be restricted to a number of occupations in the remaining group of unorganized employees and found that to avoid undue fragmentation the only appropriate unit was a tag-end unit.

11. For all of the above reasons the Board finds that the unit of employees appropriate for collective bargaining includes all office, clerical, sales employees of the respondent at the Howard Johnson Hotel at 801 Dixon Road, Rexdale, Ontario save and except supervisors, persons above the rank of supervisor, persons covered by subsisting Collective Agreements and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on October 22, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. The application is therefore dismissed.

1588-82-R Ontario Oublic Service Employees Union, Applicant, V. Ottawa General Hospital, Respondent

Bargaining Unit – Practice and Procedure – Established bargaining structure for full-time medical technologists excluding “professionals” – Union’s request for “all paramedical employee” unit in part-time application refused – *Stratford General Hospital* principle not intended to disrupt established bargaining patterns – Board policy to “mirror” part-time unit with existing full time unit

BEFORE: M.G. Mitchnick, Vice-Chairman, and Board Members W.H. Wightman and Stewart Cooke.

APPEARANCES: *Ross Wells, Virgery Vanier and Diana Forrest for the applicant; Paul S. Jarvis, Michael Lalonde and Raymond Thibault for the respondent.*

DECISION OF THE BOARD; December 17, 1982

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. While it was apparent at the hearing that the applicant has sufficient membership support to entitle it to a certificate, it fell to the Board to decide which of two proposed bargaining units is appropriate. The applicant asked that the unit be described as:

All paramedical employees of the respondent at Ottawa, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed in the school vacation period, save and except persons covered by a subsisting collective agreement.

The respondent, on the other hand, argues that the appropriate unit is:

All medical laboratory technologists employees of the respondent at Ottawa, Ontario, regularly employed for not more than twenty-four hours per week and students employed as medical technologists during the school vacation period save and except laboratory scientists, clerical staff and persons covered by subsisting collective agreements.

The difference in positions arises out of the history of collective bargaining at this hospital.

4. All of the employees affected by this application are what are normally referred to as “paramedical” employees by the Board. In order to avoid undue fragmentation, the Board normally likes to see a bargaining unit of all such employees, be they full-time or part-time, described as “all paramedical employees” of the hospital. See *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459. The Board recognizes,

however, that in some cases a history of trade union representation will have developed, usually before the Board's decision in *Stratford General*, which will render an otherwise appropriate bargaining unit inappropriate. The Board does not in such cases seek to impose the more general approaches to appropriateness in a way which will cause distortions to an already *existing* collective-bargaining structure.

5. This issue was recently canvassed by the Board in *Sudbury Memorial Hospital*, [1982] OLRB Rep. November 1722. In that case a Local of the present applicant already represented full-time medical technologists and radiologists, and another Local represented all full-time "office, clerical and technical" personnel. The first unit, in other words, excluded those paramedical employees generally referred to as "professionals", and the second unit then picked them up along with office and clerical staff. When the applicant began to organize part-time staff, it relied on *Stratford General* in claiming a unit of all part-time paramedical employees as appropriate. The Board, however, accepted the argument of the hospital employer that the existing collective-bargaining structure overrode the general approach articulated in *Stratford General*, and commented, at paragraph 7:

The Board has, absent any unusual factors, generally followed a policy of having part-time units organized at the same time or subsequent to full-time units, "mirror" the full-time unit.

To do otherwise in that case would have produced the anomalous result of part-time "professional" paramedics bargaining in conjunction with the remaining part-time paramedics, while the full-time "professional" paramedics would have bargained with the full-time office and clerical staff.

6. The applicant argues that the facts of the present case are distinguishable. The applicant currently represents *both* full and part-time radiologists and EEG and nuclear medicine staff, as well as the full-time medical technologists. All of the remaining paramedical staff, the "professional" group, are unorganized at both a full-time and part-time level, as are the office and clerical staff. In these circumstances, the applicant argues that it is simply filling in at the part-time level the remaining gaps in the Board's *normal* paramedical unit, and since the *full-time* "professionals" are not yet organized, there is in fact no full-time bargaining structure to "mirror".

7. This is not a bad argument. The fact remains, however, that a bargaining structure does exist for the full-time medical technologists, and it is really the part-time medical technologists which the applicant has now organized in this case (the applicant has filed no membership cards for the "professional" employees that it asks the Board to include in its unit). That structure indicates that the "technical" paramedics have never involved the "professionals" in their bargaining at this particular hospital. The only group of employees remaining to be organized within that non-professional bargaining structure are the part-time medical technologists.

8. The Board is extremely sensitive to the importance of avoiding, except for good reason, different bargaining-unit configurations for full-time and part-time employees of the same classification, because of the potential for collective-bargaining anomalies or distortions which that creates. It must be borne in mind that the same

employee (and this may be particularly true in the health-services field) may be "part-time" one week and "full-time" the next. Given the history of collective bargaining which has already developed at this hospital, as well as the pattern of organization relating to the present application, the Board finds the bargaining unit proposed by the respondent to be the appropriate one (cf. *K-Mart Canada Limited*, [1981] OLRB Sept. 1250).

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on November 30, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. The Board accordingly certifies the applicant as exclusive bargaining agent for all medical laboratory technologists of the respondent at Ottawa regularly employed for not more than twenty-four (24) hours per week and students employed as medical technologists during the school vacation period, save and except laboratory scientists, clerical staff and persons covered by subsisting collective agreements.

11. A certificate will issue to the applicant.

0756-82-R United Food and Commercial Workers International Union, Applicant, V. **Primo Importing and Distributing Co. Ltd.**, Respondent, V. **Primo Employees' Association**, Intervener.

Certification – Collective Agreement – Trade Union Status – Employee committee formed with employer support obtaining offer from employer – Employee association subsequently formed obtaining ratification and signing agreement – Taint of employer support flowing through to association – Denied certification – Agreement not bar to application for certification by applicant

BEFORE: R.D. Howe, Vice-Chairman, and Board Members J.A. Ronson and S. Cooke.

APPEARANCES: James Hayes, Vincent Gentile, Ron Lebi and Stan Henderson for the applicant; R.M. Parry, Arthur Pelliccione and Angelo Capozzi for the respondent; M.G. Horan and M. Zangolli for the intervener.

DECISION OF R.D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER S. COOKE; December 24, 1982

1. This is an application for certification in which the applicant seeks to be certified without a representation vote, pursuant to section 8 of the *Labour Relations*

Act, as bargaining agent for a unit of the respondent's production employees (including drivers and warehouse personnel).

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3. The intervener and the respondent contend that this application is untimely as a result of a collective agreement which they submit was in force between them at all material times. In the alternative, the intervener seeks to be certified as bargaining agent for the employees affected by this application.

4. In support of its application for certification under section 8, the applicant alleges that the respondent has violated sections 13, 64 and 66 of the *Act*. It further alleges that the intervener is not a trade union within the meaning of the *Act*, that the Board is precluded by section 13 from certifying the intervener, and that the document which the intervener and the respondent raise as a collective agreement is not a bar to this application because the respondent has participated in the formation and the administration of the intervener contrary to section 48 of the *Act*.

5. The hearing of this matter was originally scheduled for August 6, 1982 but was adjourned to August 13th on the agreement of the parties, on the condition that any continuation of hearing would not take place during certain weeks in September due to the non-availability of a particular witness. After hearing the submissions of the parties on August 13th with respect to the procedure to be adopted in hearing this case, the Board ruled that it would first call upon the intervener to adduce its evidence (concerning its trade union status and concerning all other outstanding issues), and would then hear the respondent's evidence and the applicant's evidence on all aspects of the case, followed by reply evidence (if any) of the respondent and the intervener. Unfortunately, the matter could not be scheduled for continuation of hearing until late October due to non-availability of the applicant's key adviser for an extensive period of time for medical reasons, non-availability of the aforementioned witness, and previous commitments to other pressing matters by counsel and members of this panel.

6. After the Board had heard the evidence of Marcello Zangolli, the sole witness called by the intervener, and Angelo Capozzi, the respondent's first witness, the parties agreed to argue the following issues on November 17, 1982, on the basis of the evidence of those two witnesses, thereby foregoing their right to call any other evidence concerning those issues:

- (1) whether the intervener is a trade union within the meaning of the *Act*;
- (2) whether section 13 of the *Act* precludes the Board from certifying the intervener; and
- (3) whether there is a collective agreement between the intervener and the respondent which renders the applicant union's application for certification untimely.

7. The respondent manufactures and distributes various food products. Although there remains some dispute among the parties concerning the precise composition of

the bargaining unit, it appears from the material filed with the Board by the respondent that, at the time of this application, its work force consisted of over 180 non-managerial production and delivery employees. It is common ground among the parties that the bargaining unit should include employees at the respondent's Huxley Road plant and its Marmora Road plant.

8. It appears that the applicant or its predecessor, the Amalgamated Meat Cutters and Butcher Workmen of North America (which merged with the Retail Clerks International Union in June of 1979 to form the applicant) has been attempting to organize the respondent's employees for a number of years. Although the evidence concerning those organizational activities was somewhat sketchy, it is a matter of record that the Amalgamated Meat Cutters and Butcher Workmen of North America filed complaints against the respondent in 1975 under what is now section 89 of the Act (Board File Nos. 1200-75-U and 1784-75-U). It is also a matter of record that a previous certification application (hereinafter referred to as the "earlier application") was filed by the applicant in relation to the respondent's production employees on June 13, 1980 (Board File No. 0570-80-R, which was heard together with File No. 0686-80-U). As noted in paragraph 6 of the decision of the Board (differently constituted) in respect of that application (reported in [1981] OLRB Rep. July 953), some of the (Amalgamated Meat Cutters . . .) cards filed in support of that application dated back to 1978. That decision was issued after 16 days of hearing in which the Board heard evidence of 21 witnesses. Since both the applicant and the respondent placed some reliance on that decision during their respective arguments, it is appropriate to quote certain passages which provide an overview of the Board's decision in that matter:

"28. The union's charges of misconduct were particularized in 32 paragraphs, involving 20 separate allegations of unlawful interference with its organizing campaign. Some of these allegations were modified or amended during the hearing; some were settled or withdrawn; and some were not seriously pursued. Most of the charges were not substantiated by the evidence - although in so finding, we do not wish to suggest that they were frivolous. There were some instances of illegal activity, as well as circumstances which could give rise to a reasonable suspicion on the part of employees. On balance, however, we are satisfied that the evidence does not demonstrate the kind of concerted or coordinated campaign of illegal conduct suggested by the union's initial statement of allegations.

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30. The latest trade union organizing campaign began in February or March 1980, and resulted in an application filed on June 13. On or about June 6, 1980, Angelo Capozzi, the plant manager, announced the implementation of a new benefit plan. On June 11 or 12, a written statement of the new benefits was provided to all employees. Lauro Longo, an employee of the respondent, testified that the circulation of such documents was unusual, and entirely unexpected. She could recall no previous discussion of any impending changes and told the Board that documents such as those

circulated immediately prior to the certification application were unprecedented in her seven years with the company. Angelo Capozzi told the Board however that it was the regular practice of the company to review salaries and benefits every spring after discussions with the employees, and to implement any wage increases early in May. This practice was followed in 1980. There were meetings with the employees beginning in February, and the annual pay increase was implemented in the first pay period in May. The employees were also advised that a revised schedule of benefits would be introduced when appropriate arrangements had been made with a suitable carrier. The decision to improve benefits arose from the earlier discussions and was motivated, at least in part, by a written statement of demands, dated March 14, 1980, which the employees themselves drafted in response to those discussions. This document was signed, *inter alia*, by Mrs. Longo herself, and demands both a wage increase 'the way it has been done in previous years', and certain benefits (including a dental plan) which were eventually implemented. Only the dental plan is new. All of the other changes are amendments to the existing schedule of benefits. The evidence also indicates that the established benefits have been revised from time to time, and that when this has happened, employees have been given a written statement similar to that circulated early in June.

31. We are satisfied that in revising its benefit package, the company was following its established practice, and responding to its employees' demands. There is nothing improper in its conduct in this regard

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37. There is much more substance to the union's contention that some of the respondent's foremen were involved with the circulation of the petition opposing the union. Orfeo Bizzotto, the principal petitioner is a senior employee and a close friend of Gilbert Giacomini, his foreman. Bizzotto told the Board he has been involved in organizing campaigns. On June 17, the day notice of the certification application was posted Bizzotto was out of town making a delivery; but he discussed the union with Giacomini on the telephone. He returned late in the afternoon, and the very next morning approached Lou Picinni, the traffic manager, to ask for a few days off for 'special personal business'. Picinni admits that he discussed Bizzotto's proposed 'vacation' with Giacomini, that he knew about the possibility of an anti-union petition, and that he even regarded them as 'common practice' in certification applications. He maintained however, that he was unaware of opposition to the union, did not see the petition in the plant, never actually saw anyone signing the petition, and did not know Bizzotto was involved. We do not accept these assertions. We find that Picinni and

Giacomini were aware of both the purpose of Bizotto's request and his subsequent activity. Indeed, we accept the union's evidence, and find as a fact, that Bizotto was regularly on the company premises promoting the anti-union petition, and was in and out of Picinni's and Giacomini's office during the time when he was 'on vacation'.

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40. The Board has no doubt that there was unlawful interference with employee rights in at least one instance. That instance involved Gilbert Giacomini, the driver foreman, and Toni Spadafora, a driver with the respondent for more than 16 years. On Friday, June 20th, Spadafora was summoned to Giacomini's office where he was told that he must 'vote against the union' or the company would 'close its doors', and that Orfeo Bizzoto was outside the plant with the petition that he must sign. Spadafora signed. This incident not only constitutes a breach of sections 56, 58 and 61 of the Act, but also strengthens the inference that Giacomini at least, was closely associated with the circulation of the petition, and was actively assisting Bizzoto to solicit support.

41. Bizzoto himself was not above intimidatory comments if it served his end. He led Sergio Greci to believe that he was acting on behalf of the company and suggested that if he (Greci) did not sign the petition he would have problems, be placed on a black list, and eventually discharged. Greci signed the petition. We find that Bizzoto's comments constitute a breach of section 61 of the Act, although we are not satisfied that he was acting on behalf of the respondent and do not attribute this particular threat to it.

42. The foregoing constitute the only specific breaches of the Act which, in our view, were sustained on the evidence. We do not think it is necessary to deal further with those allegations which were not borne out by the facts.

43. Is the respondent's breach sufficient to justify the issuance of a certificate pursuant to section 7a; or, to address the principal issue directly, can the true wishes of the employees be ascertained by a Board-supervised secret ballot vote? In answering that question it is helpful to compare the situation here with that in cases such as *Radio Shack* [1979] OLRB Rep. Dec. 1220, *Skyline Hotel* [1980] OLRB Rep. Dec. 1811, *K-Mart* [1981] OLRB Rep. Jan. 60 or *Norseman Plastics* [1979] OLRB Rep. April 385. Here there are no discharges, demotions, transfers or layoffs. There are no 'captive audience' or small group meetings. There are no speeches or anti-union leaflets. There is no overt surveillance or any systematic attempt to identify, isolate or discriminate against union supporters. There is no evidence of widespread threats or other coercive activity attributable to the respondent. The evidence simply does

not demonstrate a co-ordinated or concerted campaign of illegal conduct, and the illegal conduct which did occur was not prompted by any direction from above, but happened despite the explicit instructions of senior management that foreman were not to involve themselves in activity for or against the union. Not only were senior management not involved, Arthur Pelliccioni, the vice-president and general manager, was considered to be an honourable man, respected by both supporters and opponents of the union.

44. We accept the union's contention that many of its supporters were fearful that the company would close or they would be blacklisted if they continued to support the union. We also accept that rumours to this effect were circulating in the plant and that such speculation would necessarily be fueled by the threats made by Bizzoto and Giacomini. In all the circumstances however, we are satisfied that an appropriate remedial order fashioned pursuant to section 79, will be able to create an atmosphere in which the true wishes of the employees can be ascertained by a Board supervised representation vote. In a bargaining unit of this size employees need not fear that their preferences will be made known; and if the general manager assures them that they will not be subject to reprisals from over-zealous foremen, we are satisfied that a vote can be fairly conducted. Accordingly, the Board directs the respondent to post at its place of business, copies of the attached notice ('appendix'). Copies of such notice, to be furnished by the Registrar, shall, after being duly signed by Arthur Pelliccione, be posted immediately and the posting must be maintained for a period of 60 consecutive working days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the respondent to ensure that such notices are not altered, defaced, or covered by any other material. Representatives of the complainant union shall have reasonable access to the respondent's premises to ensure that the respondent has complied with this directive. The Board also directs the respondent to mail, without comment, a copy of this notice to all employees in the bargaining unit and to all of the respondent's managerial personnel."

That representation vote, which was held on September 10, 1981, was directed by the Board (in the exercise of its discretion under section 7(2) of the Act) notwithstanding the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the material time, because although a number of the applicant's members, who had signed membership cards and paid \$1.00 in respect of initiation fees more than one year prior to the application, had within one year prior to the application signed a written confirmation, reaffirming their membership in the applicant, they had not "made a recent monetary payment to the Union or confirmed their continued support in a manner more tangible than a simple written statement". (Thus, it was unnecessary for the Board to determine whether or not the petition filed by the objectors in that case was "voluntary".)

9. The sole witness called in the present case by counsel for the intervener in support of his contention that the intervener is a "trade union" within the meaning of the Act was Marcello Zangolli. Mr. Zangolli is a truck driver who has been employed by the respondent for about six years. He had no involvement in the applicant's earlier application or the Board hearings that were held in relation to that application. He became involved in the process which ultimately culminated in the formation of the intervener, at the request of Orfeo Bizzoto and Toni Palmisano, two employees of the respondent who were actively involved in the earlier application as opponents of the applicant. As noted in paragraph 42 of the decision in that matter (as quoted above), Mr. Bizzoto, another truck driver employed by the respondent, was the "principal petitioner" in those proceedings. Mr. Palmisano, who works in the respondent's shipping department, was also identified in that decision (at paragraph 36) as "one of the petitioners". The involvement of those two individuals in those proceedings was also confirmed by the evidence adduced before the Board in the present case.

10. Mr. Zangolli told the Board that prior to the (September 10, 1981) vote, Messrs, Palmisano and Bizzoto asked him at work if he would attend a meeting on the Friday before the vote (September 4, 1982) to speak to the drivers and the members of the shipping department about forming an employees' committee. It was his evidence that because he speaks both English and Italian, they wanted him to serve as a translator at that meeting, which was held at the home of another employee. That meeting, which continued for about two hours, was attended by approximately 20 to 25 of the respondent's employees, many of whom speak Italian. No supervisors were present. Most of the discussion at that meeting was about forming an employees' committee, although "a couple of people" suggested that an employees' association should be formed. This was the first time that Mr. Zangolli had ever heard the idea of an employees' association being discussed. Mr. Zangolli told the Board that employees expressed the view at that meeting that the applicant was going to lose the representation vote but that employees "would still like to organize [themselves]" in an effort to improve communications and relations between the employees and the respondent, and in an effort to equalize the wages being paid to persons performing the same jobs for the respondent but receiving different wages.

11. It was Mr. Zangolli's evidence that the conclusion reached at that meeting was that if the applicant union did not win the vote, the employees would attempt to form a committee. He also testified that after the applicant lost the vote (in which 116 ballots were marked against the applicant and only 69 ballots were marked in favour of the applicant), "things were pretty hot, a lot of people were upset, so we just let it cool off for a while". However, in early October when employees began to inquire about what was happening with the committee, Messrs. Zangolli, Bizzoto and Palmisano, together with two other employees (Domenic Giambattista and Nelson Consentino) who had been involved in the earlier application as opponents of the applicant's bid for certification, went to see Michael Horan, the lawyer who had represented the objectors before the Board in the earlier application. Mr. Zangolli testified that the purpose of meeting with Mr. Horan in early October was to obtain advice on how to form and run an employees' committee. Although Mr. Zangolli favoured the formation of an employees' association rather than a committee, it was decided by the majority of those in attendance that they would "give the committee a chance" on the basis that after they had gained some experience with the committee, they might "go with an association later on".

12. After meeting with Mr. Horan, some of those employees met with management and indicated that they wanted to form a committee to be recognized by the respondent, and wanted management to meet with Mr. Horan concerning that matter. Mr. Zangolli was not in attendance at that meeting because his job duties had taken him to the U.S. at that time. After that meeting, the following "bulletin" was posted in the plant on the company bulletin boards in late October:

"Following the recent vote at our plant there was much discussion about the formation of a worker's [sic] committee. A few of us have taken it upon ourselves to pursue this situation further. We have had a meeting with the Company and they have agreed to recognize a committee of workers composed of representatives from each department.

The representatives will deal with the worker's [sic] problems relating to their jobs and they will meet regularly with the Company to discuss these matters. The areas of discussion will include grievances, wages, holidays, benefits and other terms and conditions of employment. Each employee is encouraged to review any of these matters with his department representative who will take the matter up with management. We have received permission to conduct a few meetings at work to explain to you how this committee will work.

In the meantime and in order to get things started we have appointed temporary representatives from each department. These people have agreed to help for now but it is certainly open to any department to hold elections if other persons wish to act as representatives.

We hope to convene our first meeting very shortly and we welcome general suggestions from any worker. For now, specific problems should be directed to the following representatives:

Drivers
Shippers
Hazelnut, Cheese, Oil, Coffee
Macaroni Department

Maintenance
Meat Department
Mill
Drivers
Shipping (Marmora)

Orfeo Bizzoto
Tony Palmisano
Domenic Giambattista
Michele Miceli
Franco Sepe
Elicia Pace
Teresa Corasaniti
Constantino Frisoli
Nelson Consentino
Virginio Darin
Marcello Zangoli
Giovanni Crolla

We believe that this committee will be most helpful to all of the workers and we urge all employees to give us your support and co-operation.

PRIMO WORKER'S COMMITTEE

That bulletin was drafted by Mr. Horan. Having regard to all of the circumstances, we infer that it was posted on the respondent's bulletin boards with the consent of management. Although some of the "temporary representatives" who had been appointed "to get things started" may subsequently have been elected by employees in the departments which they purported to represent, others such as Mr. Bizotto were never elected but nevertheless remained members of the committee. Mr. Zangolli's explanation for Mr. Bizzoto's continued presence on the committee was that "because he was one of the original founders of the committee, he should be on it".

13. On November 5, 1981, Mr. Horan wrote a letter to the respondent in which he requested an opportunity to meet with management "to discuss matters of mutual concern" to management and the Primo Workers Committee. As a result, management apparently met with the Committee later that month, but it is unclear from the evidence what was discussed at that meeting.

14. Mr. Zangolli's testimony concerning the "meetings at work" mentioned in the "bulletin" quoted above was:

"In December the people weren't sure what we were trying to do so around December we asked Mr. Horan and some of the plant managers to get together with the people to explain what it was about. The meetings started right after that in December I think."

The members of management who attended those meetings were Angello Capozzi, who is the respondent's Vice-President in charge of manufacturing, and Arthur Pelliccione. Mr. Capozzi testified that after the committee was formed he attended, at the request of Mr. Palmisano, two meetings of employees from certain departments and told the employees in those departments that Mr. Palmisano was part of the committee and that the company had recognized the committee. Mr. Capozzi estimated that, in total, between thirty-five and fifty-five employees were present at those two meetings. Mr. Capozzi also confirmed that management permitted Mr. Horan to attend at the plant in the fall of 1981 to meet with employees about forming a committee. During cross-examination, counsel for the applicant asked Mr. Capozzi if that meeting was held during working hours. Mr. Capozzi's reply was:

"They asked me if they could have a meeting. They didn't say whether it was working hours or not. I didn't go into details. I presume it was [held during] lunch hour, but I'm not sure."

15. The "representatives" listed in the aforementioned bulletin met with the employees in their respective departments during working hours, with the consent of management, "to find out what the problems were". The employees' committee (he-

reinafter referred to as the "committee") then met with management once or twice a month from December 1981, to July 1982, to discuss various employment matters such as wages, seniority, a classification system, a trip system, and a retirement savings plan.

16. Prior to 1982, members of management had an established practice of meeting with employees in individual departments before giving pay increases. In the words of Mr. Capozzi, the purpose of those meetings was "to arrive at some understanding as to what the increases should be". Those meetings were held prior to the first pay day in May since the increase was generally included in the first May paycheck. However, in 1982 management departed from that practice by meeting with the members of the committee rather than meeting with the employees in individual departments.

17. When the committee met with management on December 4, 1981, it "brought up the question as to how to raise money for [the committee's] lawyer". Management replied that this was the committee's "own affair" and that it was "up to them to arrive at an understanding". Although management thus refused to provide direct financial support for the committee, it did give the committee permission to hold weekly meetings on the respondent's premises and also authorized the holding of "general meetings" of the committee in the "old shipping office". Moreover, members of the committee were paid for the time which they spent at committee meetings when those meetings were held during working hours. The minutes of the December 4th meeting, which were taken by management, record, among other things, that it was "the general consensus that, if any worker wished to speak to Management, they [sic] may do so but they will be encouraged by same to resolve problems through Committee". It is clear from those minutes, as confirmed by the testimony of Mr. Capozzi, that by December 4, 1981, the respondent had recognized the committee as a representative of the employees of the respondent. Although management requested that the committee have a representative on it from each department, management took no steps to determine whether the majority of its employees had in any way authorized the committee to represent them before the respondent recognized the committee. Indeed, Mr. Capozzi was unable to offer any explanation for the respondent's decision to recognize the committee other than stating: "We were approached. We had meetings. We wanted to recognize them." Mr. Capozzi did, however, admit in cross-examination that he was aware that most of the people on the committee were opposed to the applicant.

18. The second meeting of management and members of the committee was held on January 8, 1982. At that meeting each "department representative" put forward requests for pay and benefit increases, and other improvements in terms and conditions of employment. In late February or early March of 1982, the committee adopted a constitution that had been drafted for them by Mr. Horan, and elected (or acclaimed) Mr. Bizzoto as president, Mr. Palmisano as vice-president, Mr. Giambattista as treasurer, and Mr. Zangolli as recording secretary. On February 24, 1982 Mr. Horan forwarded to the committee, and to counsel for the respondent, a draft of the "proposed agreement" that he had prepared at the request of the committee. That draft was subsequently used by the committee and the respondent as a basis for further negotiations.

19. The six month "bar", which the Board (in a decision dated October 14, 1982 in the earlier application) imposed on the applicant after it lost the aforementioned representation vote, expired on April 14, 1982. In early March of 1982, the applicant renewed its organizational campaign in respect of the respondent's employees; Vincent Gentile, a representative of the applicant, and other supporters of the applicant attended at the respondent's premises a number of times to distribute pamphlets to workers entering and leaving the premises, and to sign up employees as members of the applicant. Mr. Zangolli and Mr. Capozzi were each aware of those organizational activities. In his testimony before the Board, Mr. Capozzi indicated that management was aware that representatives of the applicant "were distributing leaflets outside at the front of the plant". He went on to state that management has "been aware of an organizing campaign on or off for fifteen years." He conceded in cross-examination that he was not surprised when Mr. Gentile resumed his organizing activities because he had "no reason" to expect that Mr. Gentile would not be back. Under the circumstances, it is reasonable to infer that the applicant's ongoing organizational activities were common knowledge among employees and management of the respondent at all material times.

20. In or about May of 1982, a memorandum written in Italian on the respondent's stationery was posted in the plant by the committee. The purpose of that memo, which was also posted in English, was to inform employees of the following improvements in wages and benefits which the committee had secured through discussions with management. The applicant's translation of that document, the accuracy of which was not disputed by the respondent or the intervener, reads as follows:

"We, of the Committee, would like to inform you that after several weeks of discussion with the management regarding annual raises, benefits, vacations etc., we have been able to secure the following the first pay period of May.

A) Basic pay increase of \$.90 per hour;

B) Pay vacation reduction of one year (from 7 year to 6 year - continuous service on/or before June 30 of vacation year) to entitle employee to 3 weeks vacation equal to 6% of gross annual earnings.

C) *Pay festive days* one day, namely New Year's Eve, has been obtained.

D) Registered retirement savings plan (R.R.S.P.) The company will contribute 2% of gross annual earnings to a maximum of \$400 per year per employee towards a R.R.S.P.

E) *Safety Shoes*: The company will pay \$40 rather than \$20 towards 2 pairs of safety shoes per year.

F) *Uniforms*: The company will pay 70% rather than 50% towards the acquisition of driver and driver helper uniforms. The laundering

of smocks for packaging oil and cheese and NCCITA will be paid for by the company.

Believing to have done our utmost in honestly representing *all* the employees of Primo, we, of the Committee, would like to express our thanks for your suggestions and cooperation. THANK YOU.

PRIMO WORKERS COMMITTEE

21. Mr. Zangolli testified that he "started pushing" the idea of an employees' association again around April or May of 1982 when, the committee having been unable to reach agreement with the respondent concerning sick days, "some of the guys said the committee won't work because we don't have anything to fight the Company with". (That sick leave was indeed a contentious issue is confirmed by the fact that, in early June, management received a petition which appears to have been signed by approximately 50 of the respondent's Marmora Road plant employees, protesting that the respondent's decision to eliminate sick days was unfair.) It was also around that time that the committee prepared and circulated authorizations by which employees could authorize the respondent to deduct 25¢ per week from their wages for remittance to the committee. Although many employees signed those authorizations, they were not given to management because the committee decided that "if anyone had to pay any dues, it should be all of the employees". Thus, no money was deducted from wages to finance the activities of the committee.

22. After the committee had negotiated certain improvements in wages and benefits, they decided to arrange for them to be incorporated into a written agreement. In the words of Mr. Zanolli, "We had the benefits but we wanted them in writing, so we got together with [Mr. Horan] and he handled it by getting together with the Company lawyer, I guess." It was also Mr. Zangolli's evidence that after they discussed that matter with him, Mr. Horan "came back to them with a document from the company", to which certain changes were subsequently made, primarily in relation to seniority (which the committee wanted to be "departmental seniority plus company-wide seniority" rather than merely departmental seniority as proposed by the respondent). It appears from the correspondence filed with the Board by the respondent that Mr. Parry forwarded the Company's written proposals for a collective agreement to Mr. Horan on June 8, 1982. Although the evidence is rather sketchy concerning the matter, it appears that counsel for the respondent used the "proposed agreement" forwarded to him on February 24, 1982 by Mr. Horan, as the basis for preparing those written proposals. After meeting with representatives of the committee to review those proposals, Mr. Horan forwarded the committee's counter proposals to Mr. Parry on June 21, 1982. At a bargaining meeting on June 29, 1982, the committee, which was represented by Mr. Horan, Mr. Palmisano and Mr. Giambattista, reached agreement with the respondent on a number of issues, including a company offer "to pay a \$100 bonus to employees employed on April 25, 1982 who are still employed on date of ratification". On July 6, 1982 Mr. Parry forwarded to Mr. Horan a copy of a draft collective agreement which he described as being "the Company's offer to the Workers' Committee on behalf of all of the employees in the bargaining unit agreed upon."

23. Mr. Zangolli told the Board that although agreement was reached on the contract in June, some of the members of the committee were not satisfied because they were of the view that the committee would be unable to do anything about it if the contract was broken by the respondent. It was also his evidence that after meeting with Mr. Horan to discuss the advantages and disadvantages of forming an association, they decided "in mid or early June" to form an association so that they would have the power to enforce their contract. Following further meetings with Mr. Horan, members of the committee distributed the following notice to employees outside the plant after working hours on July 8th:

"NOTICE TO ALL NON-SUPERVISORY EMPLOYEES

A very important meeting for all non-supervisory employees of Primo will be held on Sunday July 11th at 9:30 a.m. at St. Philip Neri Church *Hall* (next to the Church), 2100 Jane Street, Toronto.

The meeting will only be open to employees of Primo and the purpose of the meeting is to consider the following items:

1. A report from the Workers Committee.
2. Consideration of a proposal to pass a Constitution and form our own Employees' Association (union).
3. Consider and vote upon a contract proposal from the Company.

All employees are strongly urged to attend this meeting.

PRIMO WORKERS COMMITTEE"

24. Approximately 78 employees of the respondent attended the July 11th meeting. Also in attendance was Mr. Horan who recorded the minutes of the meeting. After calling the meeting to order, Mr. Zangolli read the following report (in both English and Italian):

"Following the union vote last Fall a number of workers got together to form a Committee to review matters of concern to all Primo employees. Representatives were elected from each of the departments to meet together and with the Company to discuss problems that affect all of us. We are aware that there were legitimate worker concerns that were not being protected under the old system and we decided that we would try to do something about it.

We have had a great many meetings with the Company over the last eight months and we have settled many workers complaints. We have also been involved in negotiations with the Company; the results of those negotiations are known to all of you and amongst

other things we are proud of the sizeable raise that we negotiated for the workers. That raise looks better and better all the time particularly when we look around us and see layoffs, wage roll-backs, and raises of only 6%.

We have been negotiating for other things besides money. We have also been negotiating for a seniority system, a grievance procedure, and for the same working conditions for all Primo workers. Those discussions have been continuing from last November right up to last week.

As you know the Workers' Committee is an informal group of employees who have been attempting to help all of the Primo workers. We have been accused of many things by the Food Workers. That union that most of us voted against last Fall, have been calling names, and acting like little children. We on the other hand have been busy trying to get better wages, benefits and working conditions for you the workers. We think that we have done a pretty good job so far and there has been no cost to you the workers.

Much has been said about what a great job the Food Workers have done at Lancia. We know that that is not true because the figures speak for themselves. Look at the schedule attached to this letter if you don't believe us. You will see that Primo workers do much better without the Food Workers. Do they have an RRSP program at Lancia? Of course not.

We do realize however that there are certain benefits that come with having a contract with the Company – a legal contract that we can enforce if the Company does not keep its end of the bargain. It is for that reason that we your Committee think it would be better if we could legally protect your rights with our own contract. In order to do that however we have to have a legal organization which we would like to call an Employees' Association. This Association would have all of the powers of a union under a contract but not any of the drawbacks that come with having outsiders like the Food Workers involved. This Association would have a Constitution, have meetings, elect officers, and be committed to do many of the things that the informal committee of workers has done up until now. More important though it would enter into a legal contract with the Company to protect grievance rights, offer job security, and protect seniority.

The Committee has been considering whether or not to take this step of forming an association. We have consulted a lawyer and he has explained all of the benefits of an association to us. He is here today to answer any questions that you may have about an

association. We the Committee would like to go on record as recommending the formation of the Employees' Association.

The Committee has negotiated the basis of a contract with the Company and we have an offer from the Company the details of which we will explain to you in a few moments. That offer can be accepted by the association which we propose to form and we will then have a legally enforceable contract.

We have to, however, take one step at a time and the first step is to form the association. Once this is done we can describe the details of the proposed contract to you, provide a summary of the contents of the document and if the majority of you vote for acceptance of that contract we will then have a legally enforceable contract with the Company.

This completes the report of the Workers' Committee from its initial involvement last November right up to the present time. We would now like to move on to a consideration as to whether or not you wish to form an Employees' Association and if so we would then like to proceed to a consideration of the summary of the contract that has been offered.

PRIMO WORKERS' COMMITTEE

25. Following discussion of the merits of establishing an association and discussion of the draft constitution, including "a lot of argument" over the constitutional provision (Article 13) requiring approval of ninety per cent of the membership of the Association for any "affiliation, merger, amalgamation or transfer of jurisdiction", the employees present at the meeting unanimously voted to "constitute themselves as a trade union to be known as the Primo Employees' Association" and approved the draft constitution. (Although Mr. Zangolli said that he did not know if the purpose of Article 13 was to "make it impossible for the Association to merge with another union", he conceded that it would not be possible "to have more than ninety per cent of the employees of Primo at the same meeting at the same time".) Sixty-eight persons then applied for membership in the Association and each paid \$1.00 on account of initiation fees and dues. There followed an election of members to various positions on the Executive Board of the Association, after which the following summary of the "offer by the Company" was read in both English and Italian:

"1. TERM

A two year contract starting on May 1, 1982 and ending in April 1984 with new wages to be negotiated in April 1983 for the second year of the contract.

2. WAGES

You already have the 90¢ per hour increase for the first year and we have been able to negotiate a further payment of \$100.00 per person for all employees upon ratification of the contract.

3. RRSP

The Company will contribute 2% of annual wages up to a maximum of \$400.00 to an RRSP for each worker. This pension plan offers maximum flexibility [sic].

4. PAID HOLIDAYS

We have negotiated one extra paid holiday (New Year's Eve) so that we will now have 11 paid holidays not 10 as before.

5. VACATION PAY

The Company is offering 6% now after 6 years not 6% after 7 years as it was previously.

6. SAFETY SHOES

The Company is offering a \$40.00 allowance towards the purchase of a pair of safety shoes (formerly \$20.00).

7. UNIFORMS

The Company will pay 70% not 50% of the cost of uniforms for drivers, *driver's helpers* and *shippers* (new). The Company will also pay the cost of cleaning of smocks for employees in Macaroni packaging, cheese packaging and nocita departments.

8. WORK WEEK

The standard work week is now 40 hours with no loss of pay for those who previously worked 42½ hours per week.

9. OVERTIME

Overtime will now be paid for 40 hours and after 8 hours in one day (new).

10. JOB CLASSIFICATIONS

The Company is going to provide job classifications and descriptions for all employees working at Primo.

11. SENIORITY

Seniority will be recognized in cases of promotion and layoff in order to protect the older employees and offer job security to the workers.

12. WAGE EQUALIZATION

The Company will be standardizing rates of pay for workers who do the same job in order to avoid any unfairness which has existed in the past.

13. LEAVE OF ABSENCE

A clause in the contract will allow leaves of absence for extended trips, etc.

14. BEREAVEMENT PAY

A clause in the contract will protect days off for workers upon the death of someone in their immediate family.

15. JURY DUTY

A clause in the contract will protect workers usual wages for time spent serving on a jury.

16. GRIEVANCE PROCEDURE AND ARBITRATION

Legal procedures in the contract to protect your rights to grieve any violations of the contract by the Company."

26. Following a discussion of the contents of that summary, a secret ballot vote was taken of all employees present (both members and non-members of the Association) in which 50 persons voted in favour of the contract and 13 voted against it. (There were also three spoiled ballots.) After the membership meeting adjourned, a meeting of the Executive Board was convened to elect the officers of the Association (pursuant to Article 7.07 of the Constitution). At that meeting, Mr. Zangolli was acclaimed President, Mr. Palmisano was acclaimed Vice-President, Mr. Bizzoto was acclaimed Secretary, and Mr. Giambattista was acclaimed Treasurer. Mr. Zangolli asked Mr. Palmisano to inform the respondent that the agreement has been "ratified", and upon returning from a two-day trip, Mr. Zangolli, "just to be sure", personally told Mr. Pelliccione "that the contract was accepted and that [the employees] had formed an association." Mr. Capozzi confirmed that Mr. Palmisano notified the respondent on Monday July 12, 1982, that the collective agreement had been ratified. However, it was also his evidence that "it was from Mr. Parry's office that [he] heard that an association has been formed". On July 21, 1982 a letter from Mr. Horan was delivered to Mr. Capozzi "to confirm" that "the Primo Employees' Association which was formed on July 11th, 1982, ratified the contract proposal delivered to [Mr. Horan] from the office of Mr. Parry on July 6, 1982." Mr. Capozzi also told the Board that he was unaware that there was any thought of an association until after it had been formed. Upon receiving notification that the agreement had been ratified the respondent paid to each employee \$100, the amount that was added to the package at the aforementioned bargaining session on June 29, 1982.

27. Although Mr. Zangolli told the Board (in cross-examination) that he did not consider the effect which forming an association could have on the applicant's organizational activities, and did not discuss that matter with any of the other members of the committee, he conceded that the matter had been discussed with Mr. Horan at a time which he was unable to specify. He also testified that by May of 1982, he understood that the signing of a collective agreement with the respondent by an employees' association could prevent the applicant from being certified. When asked if the main reason for having an association was to try to prevent the applicant from becoming certified, Mr. Zangolli said that he did not know what motivated the others, but that his personal objective was to form an association, not to prevent certification of the applicant. However, he also testified that he understood that the intervener was a rival of the applicant. Although we accept Mr. Zangolli's evidence that a desire to prevent the applicant from being certified was not his personal motivation for

supporting the formation of the intervener, it is reasonable to infer under the circumstances that such a desire was at least part of the motivation which prompted most, if not all of the other members of the committee, to actively support its formation.

28. The instant application was filed by the United Food & Commercial Workers International Union on July 16, 1982. The document which the intervener and the respondent assert to be a collective agreement that renders the applicant union's certification application untimely, was not signed by the intervener until July 26, 1982, but purports to be effective from April 25, 1982 until April 30, 1984 (and from year to year thereafter in the absence of notice of intention to terminate or amend the agreement). Mr. Zangolli's explanation for the delay in signing it was that he was out of town "a couple of times" and that "there was a few mistakes in the contract about uniforms for drivers so we went through that again." Mr. Capozzi told the Board that an agreement had "not totally" been arrived at by April 25 and that "some changes were made after that date". His explanation for April 25 being specified as the commencement date of the collective agreement was that the wage increases had been agreed to by that date in conformity with the respondent's usual practice of "paying the wage increases to employees the first pay day in May". He confirmed that at the time they signed the impugned agreement, management was aware of the present certification application. However, he stated that they signed because "there was an offer made and it was accepted". When asked in cross-examination if he knew in July of 1982 when he signed the contract that it might make it very difficult or impossible for the applicant to organize the plant, he replied, "We had made an offer and it was accepted. The fact that it would make it difficult for the applicant was not the reason." Indeed, Mr. Capozzi, after giving several rather evasive answers, ultimately stated that he was not aware that a collective agreement between the intervener and the respondent could prevent the applicant from being certified. However, having regard to his demeanour while testifying and other factors relevant to the assessment of his credibility, the Board does not find that statement to be believable. Under the circumstances, we find that Mr. Capozzi was at all material times well aware of the effect which a valid subsisting collective agreement could have on an application for certification by the United Food and Commercial Workers Union.

29. The agreement in question contains a dues check-off provision. Although the respondent has been deducting dues pursuant to that provision, it has not remitted any such dues to the intervener as it is holding them in trust pending the outcome of this application, on the advice of counsel. (The intervener has grieved the respondent's failure to remit those dues to it, and has taken steps to refer that matter to arbitration.) When asked in cross-examination how the Association has been funding itself, Mr. Zangolli told the Board that the Association has not yet received any bills. He was unable to tell the Board how the 16 days of hearing concerning the earlier application were financed by the petitioners.

30. The *Labour Relations Act* prohibits the Board from certifying any organization which has received employer support and precludes any such organization from entering into a valid collective agreement for the purposes of the Act. The rationale which underlies those legislative provisions was explained as follows in *Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509:

"The bargaining process between employers and employees always implies, in addition to their common interest, some degree of conflict between the immediate economic interests of the bargainers – the payer and the receiver of wages. This conflict of interest will necessarily co-exist with their common interest in the welfare of the enterprise from which they both derive their income; and we do not mean to suggest that harmonious relations do not exist between employers and trade unions. But short-run conflicts of economic interest are inevitable, and if they are to be resolved through the process of collective bargaining, it is highly inappropriate for the agency which represents one party to the bargain, to be in any measure under the influence of the other. Collective bargaining by its very nature requires an arm's length relationship between the bargaining parties, and there are a number of statutory provisions designed to ensure that this is the case. These include the following:

1-(3) Subject to section 90, for the purpose of this Act, no person shall be deemed to be an employee,

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(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

(a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; or

(b) if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization

shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

16. Sections such as these have been part of the legislative scheme since the first *Labour Relations Act*, and sections 13 and 48 are perhaps the most significant. Their effect is abundantly clear. The Board is prohibited from certifying any organization which has received employer support and such organization cannot conclude a valid collective agreement within the meaning of the Act. Section 46 permits the parties to a collective agreement to include a dues deduction provision or a provision allowing union officials to attend to union business on company premises or company time, but these exemptions involve commonly negotiated devices to promote the orderly administration of an *established* bargaining relationship, and it is significant that the Legislature considered it necessary to mention them specifically in order to remove any question concerning the potential conflict with section 48. There may be other forms of employer-employee cooperation in an established bargaining relationship which do not compromise the independence of the employee bargaining agency, and consequently do not raise the mischief which these sections were designed to avoid. Each case must be considered on its own facts."

See also *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806, in which the Board stated that the "broad purpose of [section 13 of the Act], simply stated, is to preserve the integrity of the collective bargaining process by barring the application of any trade union which, because of employer support, does not owe its sole allegiance to those whom it seeks to represent".

31. The Board has found in a number of cases that an employer which allows employees the gratuitous use of its premises to conduct a meeting for the purpose of forming an employees' association thereby provides support of the type contemplated by section 13 of the Act (see, for example, *Faultless-Doerner Manufacturing Inc.*, [1980] OLRB Rep. Feb. 214; *Aclo Compundors Inc.*, [1979] OLRB Rep. Sept. 845; *Crowe Foundry Limited*, [1969] OLRB Rep. May 218; *Basic Structure Steel Fabricators Limited*, [1966] OLRB Rep. March 888; *Kemp Products Limited*, [1966] OLRB Rep. Apr. 39; *S.W. Fleming and Company Limited*, [1964] OLRB Rep. June 144; *Burlington-Nelson Hospital*, [1962] OLRB Rep. Nov. 285; and *Kenora District Home for the Aged*, [1960] OLRB Rep. Apr. 28). Similarly, the fact that an employer permitted notices of such meetings to be posted on its bulletin board(s) has also been found to be relevant in determining whether section 13 precludes the Board from issuing a certificate (see, for example, *Crowe Foundry Limited*, *supra*, and *Kenora District Home for the Aged*, *supra*).

32. If the organization which was intervening in these proceedings were the Primo Workers' Committee, there would be no doubt whatever that section 13 would preclude the Board from certifying it and that, by virtue of section 48, any agreement between it and the respondent would be deemed not to be a collective agreement for the purposes of the *Labour Relations Act*. That the respondent participated in the formation or administration of the committee, or contributed financial or other support to it, is abundantly clear from the facts set forth above. The respondent not only permitted the committee's lawyer to attend at the plant to meet with employees about forming a committee (without even inquiring whether or not the meeting would be held during working hours), but also authorized the holding of meetings during working hours at which members of the committee, accompanied and supported by at least one high ranking member of management, explained the operation of the committee. Management also gave the committee ready access to the plant bulletin boards for the purpose of communicating with employees, and paid committee members for the time spent at committee meetings when those meetings were held during working hours. Although management requested that the committee have a representative on it from each department, management "recognized" the committee without taking steps to determine whether the majority of the employees in the respondent's workforce had authorized the committee to represent them. Furthermore, when the respondent recognized the committee, management knew that the majority of the "representatives" on the committee were opposed to the applicant, and also knew that, in all probability, the applicant would renew its organizing efforts within a few months. Under the circumstances, we are satisfied that the adverse effect which employee support for a committee could have on any such organizing efforts by the applicant was apparent to management, and was at least one of the factors which prompted management to recognize and otherwise support the committee.

33. Although the Board has recognized that such things as the use of company premises for meetings and the movement within the work setting of employee representatives may become part of an accepted practice as a collective bargaining relationship matures after certification, it has also noted that prior to certification, such practices generally fall within the ambit of section 13. See, for example, *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956, in which the Board wrote (at pages 959-960):

"Before proceeding the Board would point out that the incumbent association has carried on a relationship with the respondent company as the certified bargaining agent of its employees for a number of years. A co-operative spirit may, and very often does, develop between the parties as a collective bargaining relationship matures which in no way lessens the union's effectiveness to represent the bargaining unit employees. The Board refers to such things as the use of company premises for meetings, the use of company offices by union officials, the movement within the work setting of union stewards, the interview of new employees by stewards and even dues check off. Prior to certification any of these manifestations of an on-going relationship could serve as a bar pursuant to section 12 [now section 13] of the Act. Subsequent to certification, however,

these activities may be provided for in a collective agreement or may become part of an accepted practice between the parties but they in no way diminish or destroy the status of the trade union."

(See also *Milltronics Limited*, [1981] OLRB Rep. Oct. 1435, and *Tri-Canada Inc.*, *supra.*,) In the circumstances of the present case, the privileges bestowed upon the members of the committee by management did not arise from the maturation of a collective bargaining relationship after certification or voluntary recognition of a *bone fide* trade union. Thus, they fall within the prescriptions set forth in sections 13 and 48.

34. The organization intervening in these proceedings is not Primo Workers' Committee, but rather the Primo Employees' Association. Nevertheless, having regard to all of the circumstances, the Board is satisfied that the "taint" of employer support which was so blatantly conferred upon the committee by the respondent, flows through to the Association. Near the beginning of his testimony, Mr. Zangolli, the president of the intervener, told the Board, "The Primo Workers' Committee was the predecessor of the Primo Employees' Association". That management of the respondent also perceived the Association to be very closely related to the committee is abundantly clear from the fact that management purported to permit the Association to accept an offer which management had made not to the Association, but rather to the committee. The strong nexus between the committee and the Association is also evident from the total overlap of the persons who occupied offices in, and provided direction for, each organization (cf. *Beef Terminal Limited*, [1969] OLRB Rep. Aug. 613). The close connection between the committee and the Association is also apparent from the manner in which the formation of the Association was sandwiched between the committee report, in which the members of the committee expressed considerable pride in the fact that the committee had obtained an "offer" from the respondent, and then purported acceptance of that offer by the Association through a vote of the employees in attendance at the founding meeting of the Association. Thus, the Association's principal "selling point" was the offer which the employer supported committee had obtained from management, and which the committee asserted (in its report) could "be accepted by the association which we [the committee] propose to form". In view of the close relationship between the committee and the Association, no reasonable employee would make a meaningful distinction between the two organizations in terms of employer involvement and support. Moreover, the Association took no effective steps to disassociate itself from the committee and its employer supported activities; indeed it readily embraced the benefits of those activities. By taking those benefits, it also took the burdens, including a substantial legacy of employer support.

35. In addition to the history of employer support which tainted the Association due to its close ties with the committee, the intervener also received direct support from the respondent in July of 1982 in the form of voluntary recognition in the shadow of the applicant's renewed organizing drive and (July 16, 1982) application for certification. As stated by the Board in *Trent Metals Limited*, [1979] OLRB Rep. Aug. 827, at paragraph 8:

"The Board can think of no more meaningful support in the context of a bi-union contest of membership ... than the extension of recognition to one of the two unions. The effect of such recognition

is to indicate the employer's desire to deal with that union to the exclusion of the other and thereby chill, if not destroy, the organizing campaign of the unrecognized trade union."

36. For the foregoing reasons, the Board finds that the April 25, 1982 to April 30, 1984 agreement entered into by the intervener and the respondent in July of 1982 must, by virtue of section 48 of the Act, be deemed not to be a collective agreement for the purposes of the *Labour Relations Act*. The Board further finds that section 13 of the Act precludes the Board from certifying the intervener in the circumstances of this case. The intervener's application for certification is therefore dismissed.

37. In view of the foregoing, it is unnecessary for the Board to determine whether the intervener is a "trade union" within the meaning of the Act (See *Tri-Canada Inc.*, *supra*, and *York University*, [1975] OLRB Rep. Feb. 127). It is also unnecessary to determine the effective date of the aforementioned agreement.

38. Counsel for the applicant asked the Board to find that counsel for the intervener and counsel for the respondent had personally contravened the Act in the circumstances of this case. However, in view of the conclusions which we have reached under sections 13 and 48, it is unnecessary for the Board to make any finding in that regard. Moreover, if counsel seeks to have the Board make such a finding, it is incumbent upon him to duly comply with the requirements of section 72(1) of the Board's Rules of Procedure. It is inappropriate for such a request to be made for the first time during final argument of the case, as occurred in the present proceedings.

39. This matter is referred to the Registrar to be listed for continuation of hearing for the purpose of hearing evidence and representations with respect to the applicant union's application for certification under section 8 of the Act, and with respect to all other matters arising out of and incidental to this application.

40. The decision of Board Member J.A. Ronson will follow.

2286-81-R United Brotherhood of Carpenters and Joiners of America Local 249, Applicant, v. **R & H Doornekamp Sons Ltd.**, Respondent, v. Group of Employees, Objectors

Certification - Construction Industry - Petition - Employer informed without solicitation that petition being signed - Employer making no comments and taking hands off attitude - Petition found voluntary in circumstances

BEFORE: Ian Springate, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: Douglas J. Wray and James Caron for the applicant; J. P. Wearing and H. Doornekamp for the respondent; J. Michael Woogh, Ron Moore, Ron Germain and Bernie Duhamel for the group of employees.

DECISION OF IAN SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER J. WILSON; December 16, 1982

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

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3. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

4. We further find that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause e of section 117 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area

unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

5. We further find, pursuant to section 144(1) of the Act, that all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the County of Lennox and Addington, the County of Frontenac, and the eographic Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. The applicant filed evidence of membership on behalf of six persons. The evidence of membership takes the form of six combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made to the union within the six month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

7. At the time of the filing of the application the respondent was engaged in building an addition to the Strathcona Paper Mill. According to the respondent's filings, it employed three employees in the bargaining unit on the date of the making of the application. The applicant's membership evidence relates to two of these employees. The applicant contends that three additional persons, all of whom are union members, should also be regarded as having been employed in the bargaining unit at the relevant time. Two of these individuals are the subject matter of a section 89 complaint in File No. 2423-81-U. The third person is claimed by the respondent to be a labourer and not a carpenter or carpenters' apprentice. There is no need at this time to make any final determination as to the status of the three individuals in dispute since it is clear that no matter whether there were three, four, five or six employees in the unit on the date the application was made, more than fifty-five per cent of the employees were members of the applicant on February 16, 1982, the terminal date fixed for this application and the date which we determine, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. There was also filed with the Board two timely statements of desire in opposition to the application. Statements of desire are not regulated by the Act as directly, or precisely, as union membership evidence. There is no statutory definition equivalent to section 1(1)(1), nor is there any requirement for a monetary payment (in the nature of consideration confirming the acting of signing), or a declaration of regularity similar to Form 80. Nevertheless, the existence of statements of desire appears to be contemplated by both section 103(2)(j) of the Act and Rule 73 of the Rules of Practice; and in any event, the Board has a long established practice of accepting statements of desire and exercising its discretion under section 7(2) of the Act to order a representation vote where: the statements are voluntary, there is

evidence given in accordance with Rule 73, and the statements contain the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt that the union's members continue to support its certification.

9. In all, four persons signed the statements of desire. One of the four was not an employee in the bargaining unit. The other three were the three persons who were clearly bargaining unit employees at the relevant time. As already indicated, the applicant filed membership evidence with respect to two of these three employees. Having regard to the numbers involved, if the two union members who signed a statement of desire did so voluntarily, the Board's normal practice would be to exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote.

10. Before the Board will direct the taking of a representation vote on the basis of an employee statement of desire, it must be satisfied that when union members signed the document evidencing an apparent change of heart, they did so voluntarily. Often, as in the present case, a statement of desire in opposition to a trade union's certification will be signed by employees who have indicated their support for the trade union only a short time before; and while an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a statement opposing the union. Frequently, such documents are circulated by employees who, in their opposition to the union, will be perceived as being aligned in interest with the employer. In these circumstances, an employee may sign a statement of desire because he fears that a refusal to do so will be made known to his employer and result in reprisals. Similarly, an employee may be motivated to sign a statement of desire because of suggestions that his continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case could one regard his signing of the statement of desire as truly voluntary, for in both cases it would result from a perceived threat to his job security.

11. There was placed before the Board certain evidence which would indicate that Mr. Henrick ("Henny") Doornekamp, the respondent's president, was a moving force behind the statements of desire and that he offered to assist the group of objecting employees with their legal and transportation costs. The evidence on point was given by two union organizers, namely, Mr. James Caron and Mr. Pat White. Their evidence consisted of statements concerning what they had been told by one of the employees, Mr. Larry Duhamel. We accept that Mr. Caron and Mr. White accurately repeated to the Board what was said to them by Mr. Duhamel. We are satisfied, however, that Mr. Duhamel's statements to them were untrue and had no basis in fact.

12. Before starting to work for the respondent only a short time before, Mr. Duhamel had operated a small business of his own. Because he had been the proprietor of his own business, Mr. Duhamel felt that he would not qualify for any unemployment insurance benefits should he become unemployed. In these circumstances he wanted to ensure some degree of job security for himself. Mr. Duhamel applied to become a union member, at least in part, because he felt that if he ceased working for the respondent, the union would be able to place him on other jobs. Notwithstanding his action in joining the union, Mr. Duhamel sought to avoid being viewed by either management or other employees as a union supporter. He signed one of the statements

of desire in opposition to the union's application. Having done so, he then sought to ensure that he would remain in the good graces of the union by purposely misleading the two union organizers into believing that he had signed the statement of desire as a result of management pressure and because management was actively supporting the group of objectors. In fact, however, management played absolutely no role with respect to the origination or circulation of the statements of desire, and gave no support to the group of objectors.

13. Before leaving the issue of Mr. Duhamel's credibility, we would comment on certain of his evidence with respect to the circumstances under which he signed an application for membership in the union. Mr. Duhamel testified that Mr. Caron and Mr. White, the union organizers, told him that if he did not join the union, and the union was later certified, he would be out of a job. According to Mr. Duhamel the organizers also stated that if he joined the union they would seek to have him made union steward on the respondent's job, in consequence of which he would be the last person to be laid off. Mr. Duhamel also stated that he was advised that the union would guarantee him work on other job sites. Having carefully compared Mr. Duhamel's testimony against that of Mr. Caron and Mr. White, and taking into account our view of the relative credibility of the individuals involved and the reasonableness of their testimony, we are of the view that Mr. Duhamel's evidence on these matters cannot be believed. Instead, we accept that the issue of possible work on other job sites was raised by Mr. Duhamel and that the union organizers indicated only that he might be able to get such work either by placing his name on a list of union members seeking work, or by attempting to get work in the territorial jurisdiction of another local of the Carpenters' Union. Mr. Caron expressly told Mr. Duhamel that the union could not guarantee him work. Further, it was Mr. Duhamel's wife who raised the possibility of Mr. Duhamel being made a steward, in response to which the organizers indicated that this was a matter outside of their control. We are satisfied that at no time was Mr. Duhamel told that if he did not join the union and the union was certified he would lose his job. Instead he was advised that if the union were certified he would be given seven days to join the applicant local under conditions set by the local.

14. Once the evidence of Mr. Duhamel, and the evidence of others as to what Mr. Duhamel told them is set aside, the remaining evidence is by and large consistent. What discrepancies exist are for the most part not major and appear to be the result of faulty memories and differing perceptions rather than any deliberate attempt to mislead the Board. Having carefully reviewed this evidence, we are satisfied that the following accurately reflects the relevant events.

15. The respondent is a construction firm which employs a relatively small number of carpenters. It is not disputed that at the time the carpenters were hired, or shortly thereafter, they were asked by Mr. Henny Doornekamp if they were union members. It is of some interest to note that notwithstanding Mr. Doornekamp's questions in this regard, of the three employees who are agreed to be in the bargaining unit, one, Mr. R. Germain, has been a member of the Carpenters' Union for about ten years while another, Mr. L. King was an ex-member who had allowed his membership to lapse. The respondent's non-working foreman on the Strathcona Mill site, Mr. Reno Serone, was also a member in good standing of the union.

16. Mr. Germain, is a long time friend of Henny Doornekamp. In cross-examination Mr. Germain was asked if there had been any discussion about the mill taking over the job if the union came in. Mr. Germain's response was that he believed that he had heard something like that from Henny Doornekamp. When pressed further, Mr. Germain indicated that he had no recollection of when the statement might have been made, and stated "I just vaguely remember it". Given the uncertainty and vagueness of Mr. Germain's testimony on this point, we accept the testimony of Mr. Doornekamp that in a conversation with Mr. Germain in January of 1982 he had mentioned that the Strathcona Mill had let go one of its unionized contractors. There was no reference at all in the comment to the respondent possibly closing down, and we are satisfied that at that point in time Mr. Doornekamp was unaware of the applicant's organizing campaign. Indeed, on the evidence it appears likely that the union had not yet started its organizing campaign.

17. The applicant applied to be certified on February 2, 1982. The respondent received notice of the application on February 10th. Mr. Henny Doornekamp, the respondent's president, immediately sought advice from a manager at the Strathcona Paper Mill about what he should do. He was advised to post the Form 75, Notice to Employees which he had received from the Board, and then take a "hands-off" position and not discuss the matter with any of the employees. Henny passed this advice on to his brother Renny, who also holds a managerial position with the respondent. On the evening of February 10th the Form 78 notice was posted in the respondent's construction shack at the job project.

18. On the evening of February 11th, Mr. Duhamel telephoned Mr. Ron Moore, a carpenter who had been employed by the respondent for some three years, but who at the time was away from work due to a foot injury. During their telephone conversation, Mr. Moore asked what was going on at work, to which Mr. Duhamel replied that the applicant trade union was trying to "get in". Mr. Moore, who had not previously been aware of the applicant's organizing campaign, indicated that he was opposed to the applicant being certified. Mr. Duhamel replied that he was as well. It is this effort on Mr. Duhamel's part to be "all things to all people" to which we have already referred.

19. On the same evening Mr. Moore drafted a statement of desire in opposition to the application. He did so without having discussed the matter with anyone in management. At coffee-break time on the morning of February 12, 1982, Mr. Moore arrived at the job site with his statement of desire and stayed for about twenty minutes. During this period Henny Doornekamp was away from the job site. Renny Doornekamp was on the site, but because he was working on equipment some distance away, he likely was not aware of Mr. Moore's visit. When he arrived on the job site, Mr. Moore first encountered Mr. Reno Serone, a non-working foreman. Although at the time he was serving in a managerial capacity, Mr. Serone was known to be a long-time member of the Carpenters' Union. Indeed at the suggestion of Mr. Duhamel, the two union organizers had previously visited Mr. Serone to get him to support the union's certification application, but had dropped the matter when Mr. Serone advised them that he was out of the bargaining unit. When Mr. Moore encountered Mr. Serone he indicated that he had a "petition" for the men to sign. Mr. Serone replied that it was a matter that did not involve him since he was a non-working foreman, and he walked away. While Mr. Moore was talking to Mr. Serone, Mr. Duhamel and Mr. Germain

came up to join them. Mr. Moore asked them to accompany him to the construction shack. On the way to the shack, Mr. Moore waved to another employee, Mr. Larry King, to join them.

20. Inside the shack Mr. Moore asked the three employees to sign the statement of desire. Mr. King declined to do so, but both of the other men signed. Mr. Moore then left the job site and apparently mailed the statement of desire to the Board.

21. Not long after Mr. Moore had left the job site, Mr. King advised Mr. Germain that he had decided to sign a statement of desire. At lunch time, Mr. Germain telephoned Mr. Moore's house and left a message to this effect. Mr. Moore then wrote out a second statement of desire and returned to the job site. He and Mr. King went into the shack so that Mr. King could sign the statement. As the two men were entering the shack, they encountered Mr. Renny Doornekamp coming out. Renny Doornekamp first inquired about Mr. Moore's health, and then asked what he was doing at the job site. Mr. Moore replied that it was in connection with the union, at which Renny Doornekamp raised his hands and walked away. Once inside the shack, Mr. King indicated to Mr. Moore that because of certain domestic problems, he felt he would be moving away and so it did not matter whether he signed a statement or not. Mr. King then signed the statement of desire which Mr. Moore had brought with him.

22. After leaving the job site with the second statement of desire, Mr. Moore set out to drive to Deseronto to mail the document. While driving along a township road Mr. Moore passed Henny Doornekamp who was driving the other way. The two men recognized each other and stopped their cars. Henny Doornekamp got out of his car and went over to talk to Mr. Moore. After Mr. Doornekamp had inquired about Mr. Moore's foot, he asked why he was out and about. Mr. Moore's response was that it was to "get names" to oppose the applicant's certification, and that "all of the men had signed." Mr. Doornekamp's only response was that he could not discuss the matter, and the two men then parted company.

23. When Henny Doornekamp arrived at the job site he was approached by Mr. King who advised him that he was quitting and wanted his separation slip and any money owing to him. Mr. King told Mr. Doornekamp that he had joined the union because he wanted to regain his lapsed union status, but that he had also signed a statement of desire. At some point, either on the same day or shortly afterwards, Mr. Germain tried to draw Henny Doornekamp into a discussion about the union, but Mr. Doornekamp refused saying he was not supposed to talk about it. At a later point in time, after the terminal date, Mr. Doornekamp asked Mr. Sean Hicks, who he had understood to be a labourer, if he was a carpenters' apprentice and whether he had joined the union. Mr. Hicks replied "no" to both questions. We would note that Mr. Hicks initially testified that this conversation had occurred on February 2, 1982, but later in his testimony indicated that he was not certain about the date. In these circumstances we have accepted Mr. Doornekamp's testimony that he had taken care not to discuss the matter with Mr. Hicks until after the terminal date.

24. Mr. Moore made the arrangements to retain a lawyer to assist the group of objectors in presenting their case before the Board. At Mr. Moore's request, he was joined at the lawyer's office by Mr. Germain and Mr. Duhamel. The evidence is that

Mr. Duhamel asked Henny Doornekamp for time off so that he and Mr. Germain could see a lawyer, and that the respondent provides employees with time-off without pay to attend to personal matters. The three employees involved agreed to split the lawyers account three ways. No financial assistance was requested or received by the group of objectors from management.

25. As indicated above, the Board is always concerned that employees may have signed a statement of desire in opposition to a union's certification due to a concern that a refusal to do so might become known to their employer and result in reprisals. In the instant case, because of Mr. Moore's uninvited comment at the road side, Mr. Henny Doornekamp did come to learn that the employees had signed a statement of desire. This comment was, however, made after all of the signatures had been obtained on the statements and accordingly, Mr. Moore's comment could not have affected the documents' voluntariness. Equally, any later conversations between Henny Doornekamp and various employees cannot have a bearing on the voluntariness of the statements at the time that they were signed.

26. We turn now to consider the actual circumstances under which Mr. Duhamel and Mr. King signed the statements of desire. For our purposes, there is no need to scrutinize the circumstances surrounding the signing of the document by a third employee, since no membership evidence was submitted with respect to him.

27. At the time Mr. Duhamel signed a statement of desire, Mr. Henny Doornekamp was not on the job site, and Renny Doornekamp was some distance away. Accordingly, Mr. Duhamel likely did not sign out of a concern that either of the brothers might actually see him refusing to sign a document in opposition to the union. Mr. Duhamel did see Mr. Serone, the non-working foreman, talking briefly to Mr. Moore. In other circumstances, this might have raised a concern on Mr. Duhamel's part that Mr. Moore was on the job site with management's permission and support. Such a concern did not likely arise in this case, however. Mr. Serone was a known member of the union, and hence, unlikely to be viewed as being involved in any action against the union. Further, Mr. Duhamel had earlier suggested to the union organizers that they approach Mr. Serone about supporting the union's certification. This indicates that Mr. Duhamel likely regarded Mr. Serone as someone who would come within the bargaining unit. When these two matters are taken into account, we feel it unlikely that Mr. Duhamel would have concluded from Mr. Moore's brief discussion with Mr. Serone that management supported Moore's actions. Further, since Mr. Serone was not present in the job shack when the employees were asked to sign a statement, Mr. Duhamel would not likely have signed out of a concern that Mr. Serone would be aware of any refusal to do so.

28. Mr. Duhamel's own testimony as to why he signed a statement of desire is of little assistance in assessing the voluntariness of his signing. At one point, Mr. Duhamel agreed with union counsel that he had signed the document to protect his "cover", but he then immediately denied signing as a result of concern that the respondent would take action against him if it discovered that he had joined the union. Instead, he stated that his only concern was that he might lose his job if the union were certified. We have already indicated our view as to the weight that can be placed on Mr. Duhamel's testimony. We have concluded, however, that at the time Mr. Duhamel

signed the statement of desire, there was no reasonable basis for him to believe that a refusal to sign would likely result in some sort of action being taken against him. This being the case, we are satisfied that we should accept his signing of the document as a voluntary act.

29. The only other relevant employee to sign a statement of desire was Mr. Larry King. When Mr. King and Mr. Moore entered the job shack so that Mr. King could sign the document, they met Mr. Renny Doornekamp on his way out. Mr. Moore volunteered to Mr. Doornekamp that he was on the job site in connection with the union. In other circumstances this contact with Mr. Doornekamp just prior to Mr. King signing the document might well have been fatal. However, Mr. King had already decided to sign a statement of desire and had communicated this fact to Mr. Moore through Mr. Germain. Further, Renny Doornekamp, by his actions, clearly indicated he wanted nothing to do with any discussion of the union, either pro or con. Accordingly, in our view, Mr. King would not likely have been unduly influenced by the chance encounter with Mr. Doornekamp. This being the case, we are also prepared to accept that Mr. King signed the statement of desire voluntarily.

30. Having regard to the above, we are of the view that prior to the terminal date two union members voluntarily signed a document indicating they no longer supported the applicant's certification. This being the case, absent consideration of the matters referred to below, we would be prepared to exercise our discretion under section 7(2) of the Act to direct the taking of a representation vote.

31. The applicant has requested that if it is not otherwise entitled to automatic certification, that the Board certify it outright pursuant to section 8 of the Act. In support of this request, the applicant relies on the particulars set out in File No. 2423-81-U, being a complaint under section 89 of the Act. In consequence, this matter will continue for hearing in conjunction with the section 89 complaint.

DECISION OF BOARD MEMBER C. A. BALLENTINE;

1. I disagree with the majority decision that the "statement of desire" in this case is voluntary.

2. The Board has found in a considerable number of cases, that it must be guided by the overall environment in the work place and the cumulative impact of events. If the evidence establishes that management has created a "climate" which thwarts voluntary expression of the employees then the statement of desire cannot be accepted.

3. The evidence of Henny Doornekamp, one of the principals of the company, and other witnesses, establishes that the company created a "climate" that gave a clear message to the carpenter employees that this company was concerned and was on guard against the possibility of being organized by the carpenters union, and was supportive of the petition.

4. Mr. Doornekamp told the Board that he and his brother operated a small sewer and watermain construction company. When he received the contract for the

Strathcona Paper Mill project he hired Mr. Reno Serone to supervise the carpentry work. Mr. Serone suggested to him at one time that he should consider going union so that the company could bid work on larger types of projects. Mr. Doornekamp said he agreed with him, but at the present time he was just a sewer and watermain contractor and didn't want to be a union contractor unless the company got bigger.

5. Mr. Ron Germain gave evidence that he was a long-time friend of the Doornekamps and he didn't believe the Doornekamp company should be organized. Under cross-examination, Mr. Germain admitted that Henny Doornekamp had told him if the union came in, Strathcona Paper Mill would take over the work and Doornekamp could be out. Henny Doornekamp admitted under cross-examination that he could have told Germain this.

6. Mr. Sean Hicks gave evidence that around the first of February at about 9:30 p.m. or 10:00 p.m. Henny Doornekamp phoned him at home and asked him if he was a carpenter apprentice or a labourer and if he had signed a union card. Mr. Hicks said he advised Mr. Doornekamp that he was a labourer and had not signed a union card. He said that Mr. Doornekamp also asked him if he knew whether Larry King had signed a union card. Mr. Hicks told him he didn't know. Mr. Hicks said that the next day at work Henny Doornekamp went up to Larry King and asked him if he had signed for the union. Mr. Doornekamp admitted he had asked Mr. Hicks if he had signed a union card, but could not recall asking him about Larry King signing.

7. Mr. Doornekamp admitted under cross-examination that after he started hiring carpenters in the latter part of October and early November of 1981 for the Strathcona Paper Mill project, that he asked Mr. Duhamel and Mr. Chisholm when he hired them as carpenters, if they were members of the Carpenters' Union.

8. Mr. Doornekamp said "when I met Ron Moore on the highway on February 11th he told me he got all the men to sign the petition. I just assumed this was a way to get out of this, I just assumed what type Ron Moore was. First of all he wasn't a qualified carpenter. I am a civil engineer." Another surprising statement from Mr. Doornekamp came out during cross-examination after he denied that the company paid for the lawyer. Mr. Wray, counsel for the applicant union, asked the following question, "Did you ask them who was going to pay the lawyer?" "No I depend on their loyalty".

9. It is obvious from the foregoing evidence that the employees would be aware that Mr. Doornekamp was very concerned about the union getting certified, and that he would be supportive of a petition being circulated in an endeavour to defeat the union's certification application.

10. The evidence of Mr. Ron Moore, the person prepared the petition and conducted its circulation, in my opinion is suspect. Under examination in chief he stated he hadn't discussed the petition with management, but under cross-examination and questions from the Board, the evidence changed. The evidence is that he told Mr. Serone, the carpenter supervisor (clearly management) that he had a petition against the union and wanted to talk to the carpenters in the shack. This was the day he

appeared on the project, February 11th. Later when he met Mr. Henny Doornekamp on the highway the same day, he told him all the men had signed the petition.

11. Other events that must be considered in determining at their *cumulative impact* are that Mr. Germain and Mr. Duhamel were given a half a day off work on March 9th to accompany Mr. Ron Moore to visit a lawyer in Kingston, for the purpose of preparing for the up-coming Labour Board hearing scheduled for March 12th in Toronto. Another concern is who paid the lawyer. Mr. Moore's evidence is that he put \$200.00 down and Duhamel and Germain were to each pay one third of the lawyer's fee. The evidence of Pat White, one of the union organizers, is that Duhamel told him, the night Duhamel had returned from the lawyer's office, that Ron Moore had told him that the company would pay for the lawyer as well as time off work, and the company would pay for the trip to Toronto to attend the Board hearing. Considering that Duhamel's evidence is suspect as stated by the majority, and considering that Ron Moore was off work for three months with an injury, and that Bernie Duhamel was in financial difficulties, it is difficult to believe that these two employees could afford to pay a lawyer to attend three days of Board hearings in Toronto. The evidence of Mr. Pat White, should be accepted. The question is whether Bernie Duhamel told Mr. White a lie or not.

12. The cumulative events, established by the evidence are as follows:

(a) Mr. Henny Doornekamp gave a clear message to all the carpentry employees that the company didn't want any dealings with the union, he was pleased when Ron Moore told him all the men had signed the petition and said he assumed this was a *way to get out of this*. Mr. Doornekamp freely gave the only two carpenters remaining on the project, half a day off work March 9th to attend at the lawyer's office for the purpose of processing the petition. There is a natural suspicion that the company may also have paid the lawyer.

(b) Mr. Serone, the carpenter supervisor, who is *clearly managerial* allowed Ron Moore, after he had told him he had a petition against the union, to call the carpenters off their work and into the company's shack for a 20 to 30 minute meeting, to sign the petition.

(c) Ron Moore, a long time employee of the company, and the organizer of the petition, in my opinion didn't willingly give the Board the true story in regard to the preparation and circulation of the petition. I believe it was reasonable for the employees to view Mr. Moore of aligning himself with the interest and wishes of the company when he was given a free hand to circulate the petition on the project during working hours.

13. Management in this case created an environment and general atmosphere in which any reasonable person would naturally believe that management supported the

petition, and if they didn't sign it this would be known by management. In *Morgan Adhesives of Canada Limited* [1975] OLRB Rep. Nov. 813, the Board commented:

"28. There is a natural suspicion which attaches to a statement of desire following closely upon a union organization campaign. The Board must assure itself that the "change of heart" indicated by employees who sign the petition in opposition to the union after having indicated support for that same union, is a free choice unimpeded by overt or subtle pressures. The rationale giving rise to this suspicion is well summarized in the *Pigott Motors (1961) Ltd.* case, 63 CLLC 16, para. 16,264 where the Board stated:

'... In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is *precisely for this reason* and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.'

(emphasis added)

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30. The finding of the Board is not intended to imply collusion or other conscious or deliberate improprieties on the part of either the objectors and/or the respondent company. There is no evidence before the Board, which would support such a finding. The Board, however, must be guided by the overall environment in the workplace and the cumulative impact of events. In a not inconsiderable number of cases the Board has found on the basis of the cumulative effect of the evidence before it that unintentional acts or tacit behaviour by management served to create a "climate" which thwarted voluntary expression. In the *Imperial Paving* case (1966) OLRB M.R. July at page 255 the Board said:

'... The task facing the Board is to determine whether the petitions cast doubt on the evidence of membership so as to require confirmation of that evidence by means of a representation vote. In making this determination the Board is concerned, primarily, with the question as to whether the petition

were signed freely and voluntarily and truly represent the wishes of the employees. The fact that management may have intentionally set out to unduly influence the employees to sign petitions, contrary to the Act, is only one facet of the problem. Management may, by its actions, influence employees unintentionally and quite by accident but if the Board is satisfied that the employees who signed the petitions were so influenced this may well be a decisive factor in determining the overall weight to be given the evidence of membership.”

I believe that the majority have not thoroughly considered the cumulative impact of all the facts that have been revealed from the evidence.

14. I find the hand of management has been involved in the petition both obvious and devious, and it was reasonable that the employees would have a perception that if they did not sign the petition circulated by Ron Moore, management would become aware of it. It is a fact in this case that management did become aware that all the carpenter employees did sign the statement of desire.

15. I find that the statement of desire in this case is not a voluntary expression of the employees who signed it. I also do not believe that the true wishes of the employees could ever be ascertained in a representation vote, under the circumstances prevailing at the work place in this case. The statement of desire should not be considered by the Board and a certificate should issue to the applicant.

0259-82-R Gaetan Perreault, Applicant, v. United Brotherhood of Carpenters and Joiners of America, Local 2486, Respondent, v. **Roy Construction and Supply Company Limited**, Intervener

Bargaining Unit - Practice and Procedure - Termination - Appropriate unit for termination purposes in context of province-wide agreement - Whether 45 percent of province-wide unit or individual employer's unit must signify desire to terminate - Parties exempting certain projects from application of provincial agreement as part of grievance settlement - Attempt to amend bargaining unit void by virtue of s.146(2) - Persons employed in exempted projects entitled to seek termination

BEFORE: D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *G. J. Sullivan for the applicant; Harold F. Caley and Roger Charette for the respondent; No one appearing for the intervener.*

DECISION OF D. E. FRANKS, VICE-CHAIRMAN, AND BOARD MEMBER W. H. WIGHTMAN; December 21, 1982

1. This is an application for termination of bargaining rights.
2. In a decision dated June 28, 1982, this Board appointed a Labour Relations Officer to inquire into and report back to the Board on the list of employees in the unit of employees employed by the intervener. In that decision, however, the Board reserved its decision on the argument by the respondent trade union concerning the appropriate unit of employees affected by this application. The Labour Relations Officer has now reported to the Board and the Board has heard the representations of the parties concerning this report.
3. The argument put forward by the respondent trade union concerning the appropriate unit of employees in this termination application is an interesting one. Section 57(2) of the Act reads in part as follows:

“(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

• • •

The respondent argues that the application must involve the “employees in the bargaining unit defined in a collective agreement”. In the present case, the respondent refers to article 3 of the provincial collective agreement between the Carpenters’

Employer Bargaining Agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, dated December 4, 1980 in effect from July 7, 1980 to April 30, 1982. Article 3 of that agreement reads in part as follows:

“ARTICLE 3 – RECOGNITION

3.01 The EBA recognizes the Union as the sole and exclusive bargaining agent for all journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario for whom the Union has bargaining rights.

• • •”

Counsel goes on to argue that the recognition provision in the provincial agreement is for all carpenters in the Province of Ontario, which would total some ten thousand employees. In the present case, since the present application is only made by a number of employees of the intervener, it could not possibly involve forty-five per cent of that, approximately ten thousand employees and, therefore, ought to be dismissed.

4. In support of the foregoing proposition, counsel cited to the Board a number of cases in which the Board has paid strict attention to the bargaining unit as defined in a collective agreement when interpreting the aforementioned language of section 57(2). (See, for instance, *The Graphic Centre Ontario Inc.* [1977] OLRB Rep. June 379; *William Scott* [1977] OLRB Rep. Aug. 534; *The Journal Publishing Company of Ottawa Limited* [1978] OLRB Rep. May 427).

5. The first of these cases, *The Graphic Centre* case refers to part of the *Gilbarco Canada Ltd.* case [1971] OLRB Rep. March 155 where the Board commented on the relationship between the bargaining unit in a certificate and the bargaining unit in a collective agreement:

“It is not incumbent upon the parties to incorporate into their collective agreement the bargaining rights contained in the certificate granted by this Board with the geographic limitation. The parties are free to amend, alter, extend or abridge the bargaining rights contained in the certificate. Where bargaining rights in a collective agreement are not as extensive as those contained in a certificate, then that is *prima facie* evidence of an abandonment of that portion of the bargaining rights contained in the certificate, but not contained in the collective agreement. In effect the collective agreement supplants the rights given by the Board's certificate and the Board's certificate is spent once the collective agreement is signed. Or to put it another way the best evidence of the bargaining rights extant are those contained in the collective agreement. In the same way as bargaining rights in a collective agreement supplant bargaining rights in a certificate so too bargaining rights in subsequent collective agreements may supplant bargaining rights contained in prior collective agreements.”

Counsel for the respondent thus argues that in the present case, whatever the individual employer bargaining units that may have existed prior to the provincial agreement, the recognition provision refers to a bargaining unit of all journeymen and apprentice carpenters of all the employers in the Province of Ontario in the industrial, commercial and institutional sector. This amendment to the individual bargaining units, therefore, is the bargaining unit that should be accepted for the purposes of section 57(2) in the present case.

6. Clearly, section 57(2) refers to the bargaining unit defined in a collective agreement. The term "bargaining unit" is defined in section 1(1)(b) of the *Labour Relations Act* and that reads as follows:

"'bargaining unit' means a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them."

When this definition is read in conjunction with section 57(2) of the Act, it is clear that the maximum size bargaining unit is "an employer unit, or a plant unit, or a subdivision of either of them". That is, the definition of "bargaining unit" imports into the term bargaining unit the notion of employees of an employer. Indeed, the Act does not provide for certification of multi-employer units of employees, (see specifically section 1(4) of the Act which provides that the Board may treat a number of related employers as "constituting one employer for the purposes of this Act" as setting out the only way in which a number of employers can be dealt with in one certification proceeding).

7. The respondent argues that the province-wide bargaining sections of the Act are consistent with the interpretation of section 57(2) urged by the respondent union in the present case. Thus, sections 145(2), (4) and (5) prevail over section 52(1) with regard to the operation of a collective agreement. This argument was urged on the Board in a recent case, re *Clarence H. Graham Construction Limited* [1982] OLRB Rep. Aug. 1147. In that case, the Board rejected this branch of the argument pointing out that termination proceedings are not part of the bargaining process and do not fall within the provincial bargaining regime. Thus, the Board concluded:

"Just as certification can be obtained by a group of employees of an employer notwithstanding the fact that they do not embrace all carpenters (or whatever trade) in the province, so a group of employees must be able to apply for termination of bargaining rights for the employees of their own employer, although again they do not represent all the carpenters in the provincial unit."

Indeed, a close examination of sections 137 to 151 of the Act indicates that these sections do not deal with *individual* employer bargaining units except in section 144 for the purposes of a certification. Indeed, the mechanism used to consolidate bargaining on a province-wide basis in those sections is the reference to "employees represented by the affiliated bargaining agents". See, for example, section 137(1)(e) which defines provincial agreement as follows:

"'provincial agreement' means an agreement in writing covering the whole of the Province of Ontario between a designated or accredi-

ted employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the *employees represented by the affiliated bargaining agents* and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e)."

(emphasis added)

8. It is our view, therefore, that section 57(2) of the Act refers to the bargaining unit of employees *of an individual employer* and indeed that is what the present application for termination involves. We therefore reject the request that the application be dismissed because it is made by less than forty-five percent of the bargaining unit.

9. Subsequent to the report of the Labour Relations Officer the Board heard the representations of the parties on that report. Counsel for the respondent put forth two arguments concerning the effect of the report on the present application. The present application for termination has its roots in a previous section 124, referral of a grievance to this Board, Board File No. 0443-81-M. In consequence of that section 124 referral, the parties signed an agreement dated December 21, 1981 which reads as follows:

"A G R E E M E N T

B E T W E E N:

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486 ON ITS OWN BEHALF AND ON BEHALF OF THE ONTARIO PROVINCIAL COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND THE AFFILIATED BARGAINING AGENTS OF THE ONTARIO PROVINCIAL COUNCIL LISTED IN THE AGREEMENT

(hereinafter referred to as the "Union")

- and -

ROY CONSTRUCTION AND SUPPLY COMPANY LIMITED

(hereinafter referred to as the "Company")

WHEREAS the Union filed a grievance against the company and referred the grievance to the Labour Relations Board pursuant

to Section 112a of the Labour Relations Act (Board File No: 0443-81-M);

AND WHEREAS the Union and the Company are desirous of resolving their differences and clarifying certain aspects of their relationship;

NOW THEREFOR, the Union and the Company have agreed as follows:

1. The Company hereby agrees to recognize the union as the bargaining Agent for the Carpenters and Carpenters Apprentices in the employ of the Company in the I.C.I. sector of the Construction Industry and therefore that it is bound by the Carpenter's Provincial collective agreement between the Carpenters Employer Bargaining Agency (E.B.A.) and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (O.P.C.) dated December 4, 1980, (hereinafter referred to as the "collective agreement") subject to the items set out below in the I.C.I. sector.
2. It is agreed that the Company's jobs in progress as listed on Schedule "A" attached hereto will be exempt from the terms and conditions of the collective agreement. Without limiting the first sentence in this paragraph, the parties signatory below agree that no grievance will be filed, processed or referred to arbitration, and that no claim or demand of any nature whatsoever shall be made with respect to the projects listed in Schedule "A", or any work contract or subcontract performed thereon.
3. The Union agrees that carpenters and carpenter apprentices employed by the Company on the date hereof will be given the opportunity to become members of the Union and will be accepted into membership upon application. The names of the carpenters and carpenter apprentices employed by the Company on the date hereof is attached hereto as Schedule "B".
4. It is agreed that the Company's current practice of payment of wages on a two week basis will continue until the signing of the next collective agreement.
5. It is agreed that maintenance work is not covered by the collective agreement.
6. It is agreed that the collective agreement only applies to work in the I.C.I. sector of the construction industry.
7. Without limiting paragraph 2 herein, it is agreed that the Company will cancel its Health Plan and Pension Plan and hereafter be governed by the Health, Welfare and Pension Plans provided for in the collective agreement.

8. Without limiting paragraph 2 herein, it is agreed that the company can maintain its present ratio of carpenters to apprentices but however it is agreed that the hiring of any new apprentices will be discussed by the Company and the Union on the merits of each individual case bearing in mind the terms of the collective agreement.

9. Without limiting paragraph 2 herein, it is agreed that the Union will impose no restrictions on the prefabrication of items such as millwork cabinets, etc., but unloading and installation of such items on I.C.I. construction projects will be done under the terms of the collective agreement.

10. Without limiting paragraph 2 herein and for the purposes of clarity, it is understood that:

(a) with respect to structural steel erection, the Union makes no claim to the erection of structural steel;

(b) the Union makes no claim to the installation of reinforcing steel;

(c) with respect to pre-engineered metal clad buildings, the Union only claims (in addition to such carpentry work as is required on foundations):

(i) the installation of insulation if it is not sandwiched in panel;

(ii) inside cladding supporting insulation, if installed separately;

(iii) all inside finishes relating to carpentry work;

(iv) door frames, doors with related hardware, windows, partitions.

(These claims may vary depending on the make of the building.)

11. In the matter of a referral of a grievance under section 112(a) of the Labour Relations Act (O.L.R.B. File No. 0443-81-M) dated May 12, 1981, the Union agrees to withdraw the grievance and referral and the claims related thereto for all times and purposes.

This agreement shall constitute a full and final resolution of any claim, or grievance etc. that the Union may have against the Company up to the date hereto.

12. The use of the term I.C.I. denotes the Industrial, Commercial and Institutional sector of the construction industry.

DATED this 21 day of December, 1981.

FOR THE COMPANY:

("Gerald Boileau")
ROY CONSTRUCTION & SUPPLY COMPANY LIMITED

FOR THE UNION:

("Roger Charette")
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, LOCAL 2486 on its own behalf and on behalf of
the Ontario Provincial Council of the United Brotherhood of Car-
penters and Joiners of America and the affiliated bargaining agents
of the Ontario Provincial Council listed in the Agreement.

SCHEDULE "A"

LIST OF COMPANY'S PRESENT JOBS EXEMPT FROM THE COLLECTIVE AGREEMENT (paragraph 2)

<i>PROJECTS IN PROGRESS</i>	<i>CONTRACT DATE</i>	<i>ESTIMATED STARTING DATE</i>	<i>ESTIMATED COMPLETION DATE</i>	<i>VALUE</i>
Waferboard	May 4, 1981	May 15, 1981	March 1982	\$1,000,000
Dome Mines Warehouse & Various Buildings	Aug. 29, 1980	Sept. 8, 1980	April 1982	\$965,000
Dome Mill Building Steel Erection (Hilborn)		Sept. 1981	April 1982	\$490,000 (All Sub- Contract)
Porcupine General Hospital	Oct. 1980	Nov. 10, 1980	Dec. 1981	\$1,500,000
McIntyre Arena	Oct. 1981	Oct. 1981	Nov. 1981	\$25,000
Greener Steel Steel Building	Sept. 1981	Sept. 1981	Dec. 1981	\$108,000
Texasgulf Steel Building	Sept. 1981	Feb. 1982	April 1982	\$110,000"

10. The respondent argues that the effect of paragraph 2 of the above agreement is that certain jobs are exempt from the terms and conditions of the provincial collective agreement binding upon the intervener-employer. Thus, he argues that those jobs do not fall within the bargaining unit of the collective agreement as defined in paragraph one of the agreement between the parties. He thus argues that this leads to two fatal flaws in the application. The employees are not employees of the employer in the bargaining unit of the collective agreement between the intervener and the respondent, and more particularly, the applicant Mr. Perreault being employed on one of the exempted jobs is clearly not an employee in the bargaining unit. It is clear from the report of the Labour Relations Officer that all of the employees on the list of employees were working on such exempted jobs.

11. Counsel for the applicant employees argues that the agreement referred to above is between the intervener and the respondent and that the employees were not party to it. That, of course, is correct, but it is trite to point out that the employees don't make collective agreements between the union and the respondent such as constitute a condition precedent to a termination application under section 57(2). That section is very specific about employees in the bargaining unit defined in the collective agreement (see the cases referred to in paragraph 4 above).

12. The problem with the argument raised by the respondent in this matter is the proposition that the agreement referred to in paragraph 9 above (setting out the relationship between the employer and the respondent trade union) delineates a bargaining unit in the collective agreement between the intervener and the respondent. The collective agreement referred to in paragraph 1 of the agreement referred in paragraph 9 refers to the provincial collective agreement between the Carpenters' Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America. The effect to be given paragraph 2 which exempts certain jobs has to be read subject to section 146(2) of the Act:

"On and after the 0th day of April, 1978 and subject to sections 139 and 145, no person, employee trade union, council of trades unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void."

It would appear, therefore, that section 2 of the agreement dated December 21, 1981, insofar as it attempts to vary the bargaining unit in the provincial collective agreement would be null and void. Now the effect of paragraph 2 in the agreement of December 21, 1981 may very well be that neither the intervener nor the respondent can bring proceedings before this Board or any other tribunal, but for the present case, it is sufficient for us to note that vis-a-vis the employees who are not party to that agreement, that attempted amendment of the bargaining unit in the provincial agreement is null and void by virtue of section 146(2) of the Act. It would, thus, appear that notwithstanding the attempt by the respondent and the intervener to amend the bargaining unit in the provincial agreement, the applicant and the employees on the list of employees are employees in the bargaining unit of the provincial agreement in effect between the respondent and the intervener company.

13. For the foregoing reasons, the respondent's objections to proceeding with this application are dismissed. The Registrar is, therefore, directed to list this matter for continuation of hearing to deal with the origination, preparation and circulation of the petition accompanying this application for termination.

DECISION OF BOARD MEMBER S. COOKE;

I dissent.

1606-82-R Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), Applicant, v. **The Spectator**, A Division of Southam Inc., Respondent, v. Group of Employees, Objectors

Certification - Practice and Procedure - Employee status of several supervisory persons in dispute - Union having interim certification position numerically - Employer claiming inconvenience and prejudice if interim certificate issued - Whether Board exercising discretion to deny interim certificate

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *C. M. Mitchell and J. Bryant for the applicant; F. G. Hamilton, Tom McCarthy, Jack Doherty, Alex Beer and Barrie Williams for the respondent; Michael G. Horan and Tami Nolan for the objectors.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER S. COOKE; December 21, 1982

1. This is an application for certification.

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3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. Within the editorial department which is the subject of this application there are a number of persons about whom the applicant disputes the respondent's claim of managerial status. The Board accordingly appoints an officer to inquire into and report to the Board on the duties and responsibilities of:

John Flanders	Page 1 Editor
Phil Gaitens	Page 1 Editor
Gord Green	Assistant Sports Editor
Bill Harper	Night Metro Editor
Dan Kislenko	Night Slotman
Bill Muir	Entertainment Editor
Peter Murdock	Wire Editor
Gerald Ormond	Sports Editor
Michele Steeves	Women's Editor
Peter Van Harten	Burlington Bureau Chief.

5. Whatever be the results of that inquiry, however, the Board has determined that the applicant's entitlement to certification cannot be affected. The condition therefore exists under which the Board may exercise its discretion to certify the applicant on an interim basis, pursuant to the provisions of section 6(2) of the Act. That section states:

Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot

affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

6. The respondent submitted that the Board in this case ought *not* to exercise its discretion in favour of certifying the applicant at this stage. It argues that to do so will be to grant status to the applicant, and collective bargaining will commence. That, the respondent submits, will raise problems for it in two respects. Firstly, the persons in dispute involve a large number of first-line supervisors, some of whom are the respondent's sole representative on the night shift as well as at a second location quite removed from Head Office. The respondent indicates that emotions are running high over the issue of unionization and the respondent wishes to be even-handed in maintaining control. The instructions which the respondent gives to these supervisors as to their obligations and responsibilities will depend on whether they are found to be on the "managerial" side of the line. There may also, the respondent adds, be a reluctance on the part of these supervisors to issue discipline while their status is in dispute. Secondly, with respect to actual bargaining, the respondent indicates that it will be hampered at this stage in the selection of a bargaining committee, as well as in formulating its position with respect to such items as a grievance procedure.

7. The Board does not find this case to be sufficiently distinctive to justify a departure from what appears to be the policy behind section 6(2) of the Act. Similar concerns, in fact, were raised in the first case to be decided under the 1975 amendment which introduced interim certification into the statute. See *University of Ottawa*, [1975] OLRB Rep. Sept. 694. In that case, the Board expressly recognized that interim certification was likely to cause *some* problems for the employer, but observed that the problems which would dissuade the Board from invoking section 6(2) would have to be in the nature of "insuperable barriers" to the commencement of bargaining, to the point where it could be said that "no useful purpose is to be served by granting interim certification". Further, in *City of Mississauga Public Library Board*, [1976] OLRB Rep. Feb. 1, the Board wrote on the subject of section 6(2):

7. This section of the Act allows the Board to certify a trade union pending a resolution of a bargaining unit dispute in those situations where the ultimate determination by the Board cannot affect the right of the union to certification. Prior to its enactment a union which had established the required membership support could not commence to negotiate a first agreement and was required during this critical period of high expectations and uncertainty to await the final bargaining unit determinations. The amendment is designed to neutralize whatever prejudice may be suffered by a trade union and its constituents in these circumstances by confirming its right to certification and by permitting it to serve notice and to commence to bargain pending the resolution of bargaining unit disputes.

8. The bargaining unit dispute before us may be termed typical or normal. It involves a single classification which sits on the line of managerial demarcation. It must be assumed that the Legislature envisaged precisely this situation when it enacted section 6(1a)

[now 6(2)] and the Board, therefore, must be circumspect in exercising its discretion to withhold interim certification in circumstances such as these. This is not to infer, however, that if more than one classification was in dispute or if some fixed percentage of the potential bargaining unit was in dispute that the Board would withhold interim certification based on these factors alone. The exercise of the Board's discretion under section 6(1a) should never be based solely on the number of classifications in dispute or on the percentage of disputed persons in the proposed bargaining unit. The exercise of the Board's discretion must be on a *case to case basis* whereby the prime consideration is whether or not meaningful bargaining, on even a restricted number of items, can take place. If meaningful bargaining cannot take place, for reasons related to a genuine bargaining unit dispute, then the Board in the exercise of its discretion must consider the negative effect of placing the parties in a collective bargaining interface at that point in time.

9. The respondent has argued that in the circumstances before us it would not be possible to negotiate a grievance procedure. In certain situations the nature of the bargaining unit dispute might restrict the ability of the parties to formulate specific contract language. It may well be that in this case the parties could not negotiate a grievance procedure if interim certification were granted. Nevertheless, there are many non-monetary items which are unaffected by bargaining unit disputes and which can be negotiated during the interim period. Furthermore, although it is common bargaining strategy to resolve language items before monetary matters are negotiated, certain monetary items can also be discussed in the interim without prejudice to either party. The legislative intent of section 6(1a) is to permit the parties to proceed with those aspects of bargaining which are not dependent on a final resolution of bargaining unit disputes so as not to delay the onset of the already lengthy bargaining process. The Board ought not to withhold interim certification on the grounds that the bargaining unit dispute precludes the negotiation of certain items or precludes a conclusion to negotiations.

10. The respondent has also argued that it would be hindered in the selection of a bargaining committee and in its ability to communicate with those in the disputed classifications. Those below the rank of chief librarian would not normally formulate proposals or make decisions at the bargaining table although they might be a useful resource as regards departmental practices and procedures. An interim certification, however, does not preclude the employer from making information requests of the department/branch heads just as it could this classification were to be ultimately included within the bargaining unit. Although interim certification may result in a somewhat altered bargaining committee, the Board does not accept that the respondent would be handicapped in the conduct of

its negotiations to a degree which would warrant withholding interim certification and thereby causing delay which, in the normal course, the amendment was designed to circumvent.

8. The respondent's concern over discipline once again is a real one, but one that, as the applicant points out, will exist so long as the supervisor's status is unclear, whether or not the Board sees fit to grant interim certification. The Board does not see the commencement of collective bargaining itself as a circumstance which will significantly magnify the disciplinary problem. Nor is the additional factor here of remoteness or night-time supervision, while understandably a further problem for the respondent, sufficient, in the Board's view, to override the policy concerns implicit in the section. As the earlier cases indicate, the Legislature appears to have weighed the elements of inconvenience or prejudice to both sides and in enacting section 6(2) to have come down on the side of eliminating delay in collective bargaining, except in cases where the matters in dispute are so extensive as to make collective bargaining artificial or meaningless, or totally impractical.

9. The Board accordingly exercises its discretion under section 6(2) of the Act to certify the applicant on an interim basis for all employees in the Editorial Department of the respondent in the Province of Ontario, save and except the Editor, Managing Editor, Assistant Managing Editor, Associate Editor, Metro Editor, District Editor, Chief of Photography, Head Librarian, Editor – Editorial Page, Systems and Development Editor, Secretary to the Managing Editor, Secretary to the Editor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, (unit #1) and, pending the resolution of their status, excluding as well, the Night Metro Editor, Burlington Bureau Chief, Sports Editor, Assistant Sports Editor, Wire Editor, Night Slotman, Women's Editor, Entertainment Editor and Page 1 Editor. In doing so, the Board has followed its usual practice in editorial bargaining units of spelling out each of the managerial exclusions, as requested by the applicant. The Board notes that any editorial positions which are created subsequently and which in fact are managerial would be excluded by section 1(3)(b) of the Act.

10. A formal certificate must await a final resolution of the composition of bargaining unit #1.

11. With respect to the part-time unit, the Board, on the basis of the material before it, finds that more than fifty-five per cent of the employees of the respondent in bargaining unit #2, at the time the application was made, were members of the applicant on December 1, 1982, the terminal date fixed for this application and the date the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. A timely statement in opposition was filed by employees in this matter, but the objectors elected not to call evidence in support of their statement. The Board accordingly discounts that statement.

12. The Board further exercises its discretion under section 6(2) of the Act to certify the applicant as exclusive bargaining agent for all employees in the Editorial Department of the respondent in the Province of Ontario employed for not more than

twenty-four hours per week and students employed during the school vacation period (hereinafter referred to as bargaining unit #2). The exclusions for this unit will parallel those of unit #1 when the latter have been finally determined. A formal certificate for bargaining unit #2 will accordingly have to await the final resolution of bargaining unit #1 as well.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. Counsel for the applicant, in citing the *University of Ottawa* case, Board File No. 0674-75-R, emphasized that it has been "much more complicated than what (we) have before us". He adumbrated position classifications which, by title, appeared to range through the University hierarchy.
 2. I would have thought the *University of Ottawa* case is supportive of the argument advanced by counsel for the respondent in support of resolving the status of the ten employees before issuance of the certificate.
 3. In *City of Mississauga Public Library Board*, [1976] OLRB Rep. Feb. 1, my then colleague, J. E. C. Robinson, Q.C., disassociated himself from much of the obiter in that case which counsel for the applicant relied upon in the case before us. While sharing my former colleague's concerns regarding the interpretation of section 6(2), I think it important to emphasize my support for the proposition that, wherever possible, the process not be delayed if bargaining can begin even on a restricted number of issues.
 4. In this case I feel the point has been made that even the composition of a bargaining committee could not be determined until the status determination has been made and I would have delayed issuance for what I am confident would have been a short period of time.
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2522-81-JD Stoney Creek Mechanical Limited, Complainant, v. Sheet Metal Workers' International Association Local Union No. 537, The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Local Union No. 1007, The Iron Workers District Council of Ontario and International Association of Bridge, Structural and Ornamental Iron Workers Local Union 736, International Brotherhood of Boilermakers Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Respondents, v. Ontario Sheet Metal and Air Conditioning Group, Intervener

Jurisdictional Dispute – Practice and Procedure – IJDB having ceased making job decisions – Rules and Procedural rulings continuing – Method of resolution adopted by parties still in effect s.91(14) not concerned with quality of method adopted – Board finding IJDB still functioning – Board having no basis to seize jurisdiction

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

DECISION OF THE BOARD; December 17, 1982

1. This is a complaint concerning a work assignment dispute filed under section 91 of the *Labour Relations Act* in which three of the respondent trade unions contend that sub-section 14 of the section 91 deprives the Board of jurisdiction to entertain the complaint. They claim that the complainant and the four respondent trade unions are bound to collective agreements which require them to refer work assignment disputes to the Impartial Jurisdictional Disputes Board ("the IJDB"). Following a hearing at which the Board received the evidence and representations of the parties on the jurisdictional issue, but before the Board had issued a decision, the Board received a request from counsel for Sheet Metal Workers' International Association Local Union No. 537 ("the Sheet Metal Workers") to consider as evidence in that matter a document tendered with the request. The document purports to say that the IJDB has been inoperative since June 1st, 1981. The Board issued interim decisions on July 14th, July 29th and August 14th, 1982, in which it found that the relevant collective agreements to which all parties to this complaint are bound require them to refer work assignment disputes to the IJDB. It administers the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("the Plan"), a plan approved by the Building and Construction Trades Department ("the BCTD"), AFL-CIO and by 10 associations of employers which represent the employers in collective bargaining with the Department's constituent national and international trade unions.

2. The Board, for the reasons given in its July 14th decision, directed that the matter be put back on for hearing for the purpose of receiving "... the further evidence and representations of the parties with respect to whether the Impartial Jurisdictional Disputes Board is operating to resolve work assignment disputes within the meaning of section 91(14) of the Act and what affect, if any, the resolutions of that issue should have on the Board's determination of whether it has jurisdiction to inquire into this complaint". This decision deals with that issue.

3. Mr. J. K. Crump testified at the reopened hearing for the Sheet Metal Workers. He is chief of the jurisdictional department of its parent organization the Sheet Metal Workers International Association ("the International Association"). He has been a member of that organization for 33 years and a full-time employee of it for nearly 20 years, 15 years of which he has worked in its jurisdictional department. He has been chief of the department since July 1975. The department's function is to deal with all matters with respect to the International Association's trade jurisdiction, including the resolution of jurisdictional disputes between the International Association and other trade union members of the BCTD.

4. Crump's evidence confirms what has been alleged before various panels of the Board in a number of other jurisdictional dispute complaints, some of which are referred to in paragraph 4 of the Board's July 14th decision in this matter; in other words, the IJDB still exists; it issues procedural rulings with respect to its own Procedural Rules and Regulations; but it does not hold hearings and does not issue job decisions. That has been its status since June 1, 1981 and the parties herein agreed at the first hearing with that fact. What they disagree about, however, is whether that renders the IJDB effectively inoperative in terms of the requirements of their collective agreements to refer work assignment disputes to the IJDB and the concomitant effect on section 91(14) of the Act.

5. The International Association was aware prior to June 1, 1981, that the IJDB would cease making job decisions and, therefore, stopped referring disputes to it which would not likely be decided before that date. Crump admitted in cross-examination that the International Association still refers disputes to the IJDB for enforcement of a contractor's original assignment. A memorandum from its General President Edward J. Carlough dated May 7, 1981 addressed to all of its business agents in the United States and Canada, which Carlough discussed with Crump before issuing, comments as follows in its opening paragraph:

This is to notify you that after May 31st, the Impartial Jurisdictional Disputes Board will no longer render decisions on any substantive issued involving jurisdictional disputes. The Board will continue on an interim basis for the purpose only of hearing and deciding procedural questions, such as change of assignment of work. This action, ... was confirmed in a meeting of General Presidents of Building Trades unions held in Washington, D.C. May 5.

Some 13 months later Carlough addressed a letter dated June 3, 1982 to Mr. Dale Witcraft, Chairman of IJDB, with respect to the work assignment dispute in the instant complaint. The letter, in effect, is an inquiry on behalf of counsel for the Sheet Metal Workers as to whether "... the [IJDB] will now accept requests for decisions in the jurisdictional dispute between Sheet Metal Workers and Millwrights; and Sheet Metal Workers and Boilermakers.". Witcraft replied to Carlough in a letter dated June 7, 1982, the text of which reads as follows, excluding the opening paragraph:

By direction of the Joint Administrative Committee, the Impartial Jurisdictional Disputes Board ceased holding hearings and issuing

job decisions effective June 1, 1981 and while negotiations between the parties to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry continue.

However, during this period all other provisions of the Plan and its procedural rules and regulations remain in full force and effect.

Article VII, Sec. 5 states: 'It shall be a violation of this Agreement for any Local Union, International Union, Employer or Employers' Association to enter into any agreement, resolution or stipulation that attempts to establish any jurisdiction which deviates from the spirit and intent of the Agreement and Rules and Regulations of the Board.'

Article VIII, Sec. 2(a) provides: 'The Department and each of its affiliated International Unions agree that all cases, disputes or controversies involving [sic] jurisdictional disputes and assignments of work arising thereunder shall be resolved as provided herein ...'

It is incumbent upon International Unions involved in a jurisdictional dispute to settle directly between or among them. *If a settlement is not reached the Plan provides that the disputed work will continue to be performed without delay in accordance with the responsible contractors' original assignment.*

(emphasis added)

6. The following passages from Carlough's May 7, 1981 memorandum to the business agents, not surprisingly, seems to anticipate the last sentence of Witcraft's letter:

"..., it becomes *absolutely imperative* that every local union use the procedure placed into the Standard Form of Union Agreement over one year ago to require signatory contractors to pre-assign work prior to the dispatching of any sheet metal workers to a job site. (original emphasis)

A copy of the Standard Form of Union Agreement is attached and the procedure is marked out.

2nd. It becomes *absolutely imperative* that signatory contractors bid all sheet metal work in any contract the [sic] they submit a bid on. Any failure on the part of any of your signatory contractors must be held responsible and, understand, that you are responsible for enforcing this action in all cases. (original emphasis)

The "Standard Form of Union Agreement" is not in evidence before this Board and, according to Crump, is not in use in Canada. More specifically, the remarks anticipate the direction from Witcraft in his letter dated June 14, 1982 to the general presidents of

the parent organizations of the four respondents and to the complainant wherein, after describing the complaint, he states:

The International Unions involved are requested to adjust these jurisdictional disputes directly.

Pending direct adjustment by the International Unions involved, Stoney Creek Mechanical Limited is directed to proceed with the undisputed work in accordance with the original assignments. It is a violation of the Procedural Rules for a contractor who has made a specific assignment of work to change such assignment unless there is agreement between the trades involved or a directive from the Board.

7. This is not the first time that a panel of the Board has had before it similar statements by Witcraft to parties in jurisdictional complaints coming to this Board. See for example paragraphs 9 and 10 below from the Board's decision in *Ontario Hydro*, [1982] OLRB Rep. Feb. 248:

9. The raising of the status of the IJDB at the hearing on November 19th led to certain consultations between local and international officials of the Labourers' union. On November 20, 1981, the General President of the Labourers' International requested that the IJDB make a determination with respect to the work in dispute at Bruce. Mr. Witcraft of the IJDB wrote as follows to the General Presidents of the two International unions.

Pursuant to action of the Joint Administrative Committee, effective May 21, 1981, the Impartial Jurisdictional Disputes Board is not presently making or issuing job decisions. All other provisions of the Plan for the settlement of Jurisdictional Disputes and the Procedural Rules and Regulations continue in full force and effect.

Accordingly, both International Unions are requested to continue efforts to settle this jurisdictional dispute directly.

10. On November 23, 1981, Ontario Hydro forwarded the following telegram to Mr. Witcraft at the IJDB:

Ontario Hydro has implemented the Board decision of May 29, 1981 re Core Boring Holes. The Labourers' International Union has filed a complaint with the Ontario Labour Relations Board arguing IJDB is no longer in effect, therefore, Ontario Hydro is in error making the assignment. The hearing is scheduled for Thursday, November 26, 1981. Please advise status of IJDB prior to November 26, 1981.

This telegram was replied to as follows by Mr. Witcraft on November 25, 1981:

Re tel November 24, 1981 regarding complaint filed by Laborers in jurisdictional dispute with United Association over core boring of holes in concrete for pipe, Pickering Nuclear Plant Project, Pickering Ontario Canada, Ontario Hydro Contractor, plan for the settlement of jurisdictional disputes in construction industry still in full force and effect, with the exception: Board not currently issuing job decisions, jurisdictional disputes are to be settled directly by unions involved, if direct settlement not reached, contractor must proceed with disputed work in accordance with original assignment.

8. The Plan contains the following statements about the obligations of parties stipulated to it (and, pursuant to the respective collective agreements, all parties to this complaint have stipulated to the Plan):

ARTICLE VIII

OBLIGATIONS OF THE PARTIES

To the end that proper assignments of work are made by the Employer involved and that jurisdictional disputes between unions are settled under the terms of the Plan without interruptions of work, it is therefore agreed as follows:

Sec. 1. Obligations of the Employer

(a) Each Employer or Employer Association stipulated to this Plan agrees that all cases, disputes or controversies involving jurisdictional disputes or assignments of work arising under this Agreement shall be resolved as provided herein and shall comply with the decisions and awards of the Board, or is defined as a dispute between unions over the assignment of work and in which the Employer has an interest.

(b) Each Employer agrees that he shall continue to make work assignments in accordance with the Rules and Regulations of the Board. Continued misassignments by an Employer as determined by the Board shall be reported by the Chairman of the Board to the Joint Administrative Committee which shall take such procedural or legal action against such Employer as it deems necessary and proper to effectuate the purposes of this Agreement.

• • •

(e) Each employer who is bound by this Plan will use his best efforts to assure compliance with its terms by subcontractors engaged by the Employer on any construction job covered by the Plan.

Sec. 2 Obligations of the Department and its Affiliated Unions.

(a) The Department and each of its affiliated Unions agree that all cases, disputes or controversies involving jurisdictional disputes and assignments of work arising hereunder shall be resolved as provided herein and shall comply with the decisions and awards of the Board, or Hearings Panel established hereunder.

(b) The Department and each of its affiliated International Unions agree that the establishment of picket lines and/or the stoppage of work by reason of an Employer's assignment of work are prohibited. No Local Union of an affiliated International shall institute or post picket lines for jurisdictional purposes.

(c) In the event of a jurisdictional dispute, resulting in a work stoppage, strike, picket line or other interference of the work, a report of that fact shall be made by the Employer and/or the International Union immediately to the Board, to the Building and construction Trades Department and to the appropriate Employer Association office. The Board shall immediately advise the International Unions involved and the Department of the existence of such work stoppage, strike, picket line or other interference of the work.

(d) In the event pickets are posted by any local trades council or any affiliated local for jurisdictional purposes, the International Presidents and the Department will immediately direct all unions in the affected area to ignore such picketing and to continue to work. If in contravention of this Plan a jurisdictional work stoppage should occur, it is the intent of this Article that the work shall continue with the crafts cooperating to the maximum extent possible to enable job continuity.

• • •

The remainder of Article VIII goes on to state how the IJDB will deal with the type of disruptions described in section 2(c) and to deal with other conditions not here relevant.

The Plan contains other important provisions as indicated by the following extracts from some of its other Articles:

ARTICLE VI

BOARD PROCEDURE

Sec. 1(a). When a dispute is filed, the Board shall in all cases first investigate the claims of the disputing parties to determine whether or not a disposition thereof has been made by a previous decision or agreement of record or by recorded agreement between

the parties to this dispute and attested by the Chairman and issue a ruling as to the decision or the agreement governing in the case, and determine whether one of the parties to the dispute has a rightful claim to the work under agreement or decision of record.

Sec. 1(b). All agreements and decisions recognized under the provisions of the Constitution of the Department shall be considered as constituting the record.

Section 2. When work has been assigned to a craft by an Employer on projects currently employing other building trades crafts, and the craft assigned the work has by prior agreement, understanding or practice conceded the work or a portion thereof to another craft or crafts, it shall be the responsibility of the crafts to inform the Employer of such agreement, understanding or practice and it shall be incumbent upon the crafts to honor such agreement, understanding or practice, subject to the penalties set forth in the internal procedure established under Article VIII, Section 2(e). Compliance by the Employers with the Agreement understanding or practice of the crafts involved does not constitute a change of assignment.

• • •

ARTICLE VII

CONTINUATION OF WORK

Sec. 1. During the existence of this Agreement, there shall be no strikes or work stoppages arising out of any jurisdictional dispute.

Contractors and subcontractors shall make work assignments in accordance with the Obligations of the Employers as set forth in Article VIII, and the Rules and Regulations of the Board. Members of organizations affiliated with the Department shall continue to work on the basis of their original assignment.

• • •

Sec. 5. It shall be a violation of this Agreement for any Local Union, International Union, Employer or Employers' Association to enter into any agreement, resolution or stipulation that attempts to establish any jurisdiction which deviates from the spirit and intent of the Agreement and Rules and Regulations of the Plan.

• • •

9. The Procedural Rules and Regulations ("the Rules") of the IJDB provide the detailed procedures by which the parties are to fulfill their obligations and for the

administration and enforcement of the Plan. The following extracts from the Rules provide an example of this function:

MAINTENANCE OF OPERATIONS AND PROJECTS

To prevent jurisdictional disputes from arising on projects or over method of starting a project, unions and contractors, as qualified and designated herein, are directed to follow the procedures outlined below.

CONTRACTOR'S RESPONSIBILITY

1. The contractor who has the responsibility for the performance and installation shall make a specific assignment of the work which is included in his contract. For instance, if contractor A subcontracts certain work to contractor B, then contractor B shall have the responsibility for making the specific assignment for the work included in his contract. If contractor B in turn shall subcontract certain work to contractor C, then contractor C shall have the responsibility for making the specific assignment for the work included in his contract. It is a violation of the plan for the contractor to hold up disputed work or shut down a project on account of a jurisdictional dispute.

The Board will not render advisory opinions or decisions regarding unitail assignments of work. The initial assignment must be made by the contractor or subcontractor responsible for its performance.

2. The assignment to be made by the contractor shall be according to the following bases:

(a) Where a decision of record applies to the disputed work, or where an agreement of record between the disputing trades applies to the disputed work, the contractor shall assign the work in accordance with such agreement or decision of record. Agreements and decisions of record are compiled and published by the Building and Construction Trades Department, AFL-CIO, ("Agreements and Decisions Rendered Affecting the Building Industry"). Where a national agreement between the disputing trades applies that has been filed with the Board and attested by the Chairman, even though not an agreement of record, the contractor shall assign the work in accordance with such agreement. In negotiating such national agreements between International Unions, prior consultation with the appropriate management groups on the making of agreements between International Unions is desirable and should be carried on.

Decisions of record are applicable to all trades. Agreements of

records are applicable only to the parties signatory to such agreements.

(b) Where no decision or agreement under (a) applies, the contractor shall assign the disputed work in accordance with established trade practice or the prevailing practice in the locality. The locality for the purpose of determining the prevailing practice shall be defined ordinarily to mean the geographical jurisdiction of the local Building and Construction Trades Council in which the project is located.

(c) If a dispute has arisen prior to the specific assignment of work where no decision or agreement under (a) applies, or where there is no predominant practice in the locality, the contractor shall nonetheless make a specific assignment according to his best judgment after consulting the representatives of the contesting trades and considering any arguments or facts the trades may wish to present regarding the applicable decisions or agreements of record or practice in the locality. The contractor should also consult any local association of contractors in the locality regarding the established practice.

3. When a contractor has made an assignment of work, he shall continue the assignment without alteration unless otherwise directed by the Board or by the agreement between the International Unions involved.

• • •

(c) The Chairman of the Board shall determine all questions of original assignment of work and render decisions regarding same. An appeal from the Chairman's decision may be made to a meeting of the full board.

4. In the event that there is any stoppage of work, or threat of a stoppage, or cessation of operations, arising out of a jurisdictional dispute following an assignment of work, the contractor is to notify immediately the Chairman, Impartial Jurisdictional Disputes Board,

• • •

Any International Union may also notify the Board of a work stoppage engaged in by another union.

• • •

UNION'S RESPONSIBILITY

1. The agreement provides (Article VII, Section 1) that "during the existence of this agreement there shall be no strikes or work stoppages arising out of any jurisdictional dispute."

2. When a contractor has made a specific work assignment, all unions shall remain at work and process any complaint over a jurisdictional dispute in accordance with the procedures herein established by the Board. Any union which protests that a contractor has failed to assign work in accordance with the procedures specified above, shall remain at work and process the complaint through its international office. The Board is prohibited from taking action on protests or requests from Local Unions or Building and Construction Trade Councils.

3. An international Union may file with the Board a protest against the work assignment of a contractor on a particular project

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4. When an International Union has been directed by the Board to direct the return of men to work, or to furnish men to a project, in a jurisdictional dispute, the General President of the International Union shall promptly comply with the order of the Board. He shall use all the authority of the International Union to secure prompt compliance with an order of the Board.

In line with the intent of the above paragraph, picket lines of a jurisdictional nature must be handled immediately by the Chairman of the Board. The Chairman, when a jurisdictional picket line is brought to his attention, will immediately send a communication to the Building and Construction Trades Department and to the International whose local has put up the picket line.

PROCEDURES USED BY THE BOARD

A. Work Stoppages and Violations of Procedural Rules.

1. When the Board has received from a contractor or from an International Union notice of a jurisdictional work stoppage, the Chairman of the Board shall immediately notify the General President of the Union (or Unions) engaged in the work stoppage and shall instruct the General President to direct the members on strike to return to work and to perform their assigned work, and to keep work in continuous operation pending a settlement of the dispute. A copy of such return-to-work instructions from the Chairman shall be sent to the contractor, to the other International Union (or Unions) involved in the jurisdictional dispute, and to the President of the Building and Construction Trades Department, AFL-CIO.

2. When the Board has received notice from an International Union that a contractor subject to the plan for the Settlement of

Jurisdictional Disputes has failed to follow the procedural rules of the Board set forth in the section above on Contractor's Responsibility, the Chairman, upon finding the complaint valid, shall instruct the contractor to comply with the procedural rules in the making and maintaining of any assignment of work. A copy of such instruction to the contractor from the Chairman shall be sent to dispute over work assignment. These instructions do not constitute a job decision by the Board on the merits of the dispute. They are intended to keep work in continuous operation pending settlement of the dispute.

B. Job Decisions.

When the Board has received a protest of work assignment from an International Union or a request for a job decision from a contractor, it shall proceed to make a job decision as outlined below; provided, however, the Board will not make a job decision in a jurisdictional dispute while holding up or shutting down work, or caused by the trade which is requesting the job decision.

• • •

The Chairman, subject to review by the Board, shall have discretion when there is a work stoppage to treat a contractor's request for a job decision as a request to return men to work.

• • •

When an International Union requests a job decision and its members remain off the job or hold up disputed work, processing for such decision shall not start until the International Union has returned its members to work. Upon notification to the Board that the members have returned to work, the usual five-working-day request for position and information will apply.

• • •

6. Each job decision of the Board shall be sent to the affected parties and state that the job decision was predicated upon the particular facts and evidence before the Board regarding the dispute and shall be effective on the particular job only.

7. The affected Unions and contractors shall promptly comply with each job decision of the Board and of the Chairman in those disputes determined by the Joint Administrative Committee to be repetitive.

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9. In addition to all other requirements in these Rules and Regulations with respect to the form of job decision rendered by the Board, it is also required that any such decision shall include a brief statement of the description of the work in dispute and the conclusions of the Board with respect to the principal material issues which are involved in the dispute. Because efficiency, cost or continuity and good management are essential to the well-being of the industry the Board shall not ignore the interests of the consumer in settling jurisdictional disputes.

10. Section 91(14) of the Act provides as follows:

The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and such trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of such tribunal.

Were it not for the question raised with respect to whether the IJDB's present status rendered nugatory the provisions in the relevant collective agreements requiring the parties herein to refer their work assignment disputes to it, there is no doubt that the Board would be proscribed by section 91(14) from entertaining this complaint. See *Ontario Hydro* [1979] OLRB Rep. Feb. 124; *Ontario Hydro*, [1982] OLRB Rep. Feb. 248; *Dominion Bridge Company Ltd.*, [1982] OLRB Rep. June 852 *Comstock International Limited*, [1982] OLRB Rep. June 852; *Ontario Hydro*, [1982] OLRB Rep. July 1048. Do the facts herein about how the IJDB is operating at present alter that situation?

11. Counsel for the Sheet Metal Workers and the intervener Ontario Sheet Metal & Air Handling Group ("the Group") advanced two arguments in common as to why, on the above facts, the Board should find that the requisite conditions are lacking for section 91(14) to operate to deprive it of jurisdiction to hear this complaint. They construe section 91(14) to require not just the referral of work assignment disputes to a mutually selected tribunal, but that the tribunal be one which makes a decision with respect to the work assignment dispute which is a resolution of the differences between the parties. That meaning, they submit, derives from the use of the words "... can be resolved ..." contained in the phrase "... requiring the reference of any difference between them arising out of work assignment ... that can be resolved under the collective agreement, ...". Those words according, to counsel, contemplate reference to a mutually selected tribunal that makes decisions about differences "that can be resolved" and once there is a decision which is a resolution of the difference, then that decision is recognized by section 91(14) and can be enforced under that sub-section.

12. Both counsel contend that “job decisions” as referred to in the Rules deal with the merits of a dispute and, therefore, are the only decisions which satisfy that requirement. They submit that procedural decisions with respect to the application of the Rules do not deal with the merits, therefore they do not constitute a decision which is a resolution of the difference. By way of example they cite the fact that the Rules contemplate that an international union which is requesting a job decision has met with the other parties to the dispute and attempted to resolve it. A further direction from the Chairman of the IJDB on receipt of a request for a job decision, now that they are not being issued, that the parties meet and try and resolve the dispute is not a decision resolving the dispute. Nor is it such a decision of the tribunal if the parties do settle on their own, it is a decision of the parties. Nor is it a decision of the tribunal resolving the differences of the parties if, failing resolution by the parties, the Chairman directs the contractor not to alter the original work assignment. If those directions are decisions about anything at all, counsel argue, they are decisions on the application of the Rules, not on the work assignment dispute. Moreover, these directions only serve to avoid work disruption and do so by confirming the original work assignment, a procedural decision. Therefore, since the IJDB has ceased making job decisions and makes procedural decisions only, it is not a tribunal which satisfies one of the requisite conditions of section 91(14). Accordingly, a provision in the collective agreement which requires reference of work assignment disputes to the IJDB does not satisfy the requisite conditions of section 91(14).

13. The second argument about which counsel for the Sheet Metal Workers and the Group are in accord is that the decision of the National Labour Relations Board (“the NLRB”) in *Modern Acoustics, Inc.*, (1982), 260 NLRB No. 112, supports the conclusion that the IJDB is operating in a manner which is ineffective in resolving work assignment disputes and, therefore, is not a viable tribunal for purposes of section 91(14) of the Act. They find that support in the fact that the NLRB, despite the IJDB having made awards with respect to the work in dispute, found that “... since June 1, 1981, the IJDB has been inoperative, has ceased hearing [jurisdictional] disputes, and is not now a viable organization in a position to administer or police either the award or the agreement.” and seized jurisdiction under section 10(k) of the *Labour Management Relations Act*, 1947 (“the *Taft-Hartley Act*”) to deal with the dispute. In a footnote to its decision the NLRB made the following comment:

“... Accordingly, we would be remiss in our statutory duties if we did not, under the circumstances here, find that the inoperative status of the IJDB made its outstanding awards useless as a means of adjusting the parties’ work dispute.”

14. Counsel for the Group made the additional argument that the entire scheme of the Act is to foster industrial peace and to prevent “sidewalk” arbitration (i.e. picketing) from being used to resolve disputes and section 91 is an integral part of that scheme. Section 91(14) reflects the fact that the best dispute resolution machinery is consensual agreement by excluding the Board from hearing disputes where the parties have set up their own mechanism for resolving them. But when the selected tribunal adopts a stock answer of maintaining the original assignment in all cases and directing the disputing parties to discuss and resolve their dispute, it makes a mockery of the

mechanism and frustrates the purpose of section 91(14). This was good and sufficient reason, counsel submitted, for the Board to give effect to its jurisdiction under section 91(1) and hear the complaint “as a tribunal of last resort” (counsel’s words).

15. The Board disagrees with the way in which counsel for the Sheet Metal Workers and the Group construe section 91(14) to have the section mean that the work assignment disputes must be resolved by a decision on the merits, particularly their reliance on the phrase “... that can be resolved under the collective agreement, ...”. The Board has dealt with that particular phrase before when construing section 91(14). In *Adam Clark Company Ltd.*, 76 CLLC ¶16,053 the Board, having found one of the two collective agreements before it did not contain a provision for referring work assignment disputes to a tribunal, concluded at paragraph 29 that the difference as to the work assignment at issue could not “... be resolved under the collective agreement or collective agreements within the meaning of section [91(14)] of *The Labour Relations Act*.” because one of the agreements did not contain a provision of the type referred to in section 91(14). It reached that conclusion after first analyzing the reasoning in other decisions of the Board in finding whether work assignment disputes could be resolved under particular collective agreements and then carefully interpreting section 91(14). The Board concluded that, because work assignment disputes were at least tripartite in nature, it was necessary to interpret the words “collective agreement” to include the plural “collective agreements” in order for the section to give effect to the option of employers and trade unions to make private arrangements for the settlement of work assignment disputes. The Board’s analysis in *Adam Clark*, *supra*, of the reasoning in other Board decisions and the interpretation given to section 91(14) in the *Adam Clark* decision makes it clear that the meaning applied by the Board to the phrase “... that can be resolved under the collective agreement, ...” (or collective agreements) is that the agreements of all parties to the dispute must provide the same method of resolving the dispute. The phrase does not speak to the nature or quality of the method adopted by the parties other than it must be the same.

16. In fact the Board has only looked at the method provided in the agreements for resolving disputes in order to see if all agreements required that they be referred to a common tribunal. The Board has declined to look behind the procedure to the quality of the settlement process. See paragraph 8 of the its 1979 *Ontario Hydro* decision, *supra*, wherein it commented:

“In our view, where the parties have mutually selected a tribunal as contemplated in section [91(14)] they bear the responsibility of ensuring that they have entrusted their dispute to a viable entity. It is not the function of this Board to pass upon the constitution of the Plan and the ability of the IJDB to effectively perform the tasks which have been assigned to it by the parties.”

In less strong language and after comparing the relative advantages and disadvantages of the way in which the IJDB and this Board deal with work assignment disputes, the Board observed as follows at paragraph 15 of its 1982 *Ontario Hydro* decision, *supra*:

“Presumably, trade unions and employers which are active in the construction industry are familiar with both the advantages and

disadvantages of the IJDB and have those in mind when they decide whether or not to agree to include provisions in their collective agreements, requiring that jurisdictional disputes be submitted to the IJDB.”

17. The Board’s obvious reluctance to look behind the method selected by the parties is consistent with the view that section 91(14) gives employers and unions the option of making private arrangements for dealing with work assignment disputes, a point not missed by Board members Ade and Ballentine in their concurring decision in *Dominion Bridge Company Ltd.*, [1982] OLRB Rep. May 667:

1. We have no choice but to agree with Vice-Chairman Ian Springate as the decision relates to the operation of section 91(14). However, our sympathies are with the applicant union as well as other unions and companies in the construction industry in Ontario, when they endeavour to obtain a just resolve to jurisdictional disputes through the procedure of the “Impartial Jurisdictional Disputes Board” (I.J.D.B.) in accordance with existing collective agreements, such as the case at hand.

2. We want to make it clear that we have no quarrel with the “Procedural Rules” of the “I.J.D.B.”. Our concern is one that the “I.J.D.B.” and its predecessor the “National Joint Board for the Settlement of Jurisdictional Disputes” has been in a state of flux and disarray for a decade or more.

3. This is not the first time a union has been before this Board with pleas of frustration over what it considers the non-function of the I.J.D.B.. The Board dealt with a similar situation in 1979, in *Ontario Hydro*, [1979] OLRB Rep. Feb. 124. This case involved a local union of the same complainant International Union and a sister local of this complainant local union in the instant case, and it involved the same Electrical Power Systems Construction Association (EPSCA) collective agreement.

4. As the Board held in the *Ontario Hydro* case referred to above, where all the parties to the jurisdictional dispute proceeding before the Board are bound by a collective agreement containing an operative provision referred to in section 91(14) of the Act, the Board does not have the jurisdiction to entertain the complaint.

5. If employers and trade unions in the construction industry in this province choose to continue to maintain collective agreements which *require* that they refer jurisdictional disputes to a tribunal which is not functioning in a satisfactory manner, that problem must be resolved by the parties, and not by the Board or the legislature. That is precisely what the majority of the Board told the parties in 1979 *Ontario Hydro* case when it stated:

"In our view, where the parties have mutually selected a tribunal as contemplated in section 81(14) [now 91(14)], they bear the responsibility for ensuring that they have entrusted their disputes to a viable entity. It is not the function of this Board to pass upon the constitution of the Plan and the ability of the IJDB to effectively perform the tasks which have been assigned to it by the parties."

6. The purpose of section 91(14) is, in our view, to permit the parties themselves to fashion a procedure for resolving their jurisdictional disputes internally, without government intervention. This purpose is reinforced by the Act, since it requires the parties to comply with any decision issued by the tribunal selected by the parties. This objective is a laudable one which is consistent with our belief that the parties themselves know what is best for them in developing and maintaining good labour relations.

18. While the Board agrees with counsel for the Group that section 91 of the Act is an integral part of the Act's scheme for fostering industrial peace, there are two reasons why the Board is not persuaded that it should hear this complaint "as a tribunal of last resort" on counsel's contention that the present status of the IJDB frustrates the work assignment disputes resolution method adopted by the parties. First, on the facts before this Board, the IJDB has not ceased to exist or function. Second, it is at best very questionable whether the wording of section 91(14) would allow the Board on the one hand to impose standards of its own making on the method adopted under the section by parties to collective agreements for resolving their work assignment disputes and on the other hand to seize jurisdiction under section 91(1) when they are not met, as long as the tribunal selected by the parties is functioning and their collective agreements require the reference of such disputes to the tribunal.

19. With respect to the first reason, while the IJDB has stopped awarding work by means of job decisions, the rest of the Plan and its Rules are still in force and the IJDB is making procedural rulings. While the suspension of the job decision function of the IJDB leaves a significant gap, the Plan and its Rules still make an important contribution to the avoidance of work disruptions over work assignment disputes. The procedural rulings are a significant part of that contribution. The plan specifically provides that there shall be no strikes or work stoppages arising out of any jurisdictional disputes (Article VII, section 1). The agreements and decisions of record as to work jurisdiction claims of the BCTD's constituent unions are effectively made part of the Plan and unions are required to honour them and are subject to penalties for failing to do so. (Article VII, sections 1 and 2). Employers and unions are prohibited from attempting to establish any jurisdiction which deviates from the spirit and intent of the Plan and its Rules (Article VII, section 5). Employers are obligated to assign work in accordance with the Rules and the IJDB is empowered to take procedural or legal action against employers who make continued misassignments (Article VIII, section 1(b). Employers also have a responsibility under the Plan to use their best efforts to have their subcontractors comply with the terms of the Plan. (Article VIII, section 1(e). Employers and unions alike are obligated to resolve work assignment disputes in accordance with the Rules. (Article VIII, section 2(a).

20. One of the significant contributions which the Rules make to the avoidance of work assignment disputes is by providing a sound framework within which a contractor is obligated to assign work. Clause 2 of the section "Contractor's Responsibility" (see paragraph 9 herein) specifically requires a contractor to assign work in accordance with an applicable decision of record, agreement of record or national agreement. Where none applies, the assignment is to be made in accordance with established trade practices or the prevailing practice in the geographic jurisdiction of the local Building and Construction Trades Council in which the project is located. If there is no predominant practice, the contractor is to make the assignment according to his best judgement after consulting representatives of the trades. If a dispute arises before a work assignment is made, the contractor is to make an assignment after consulting representatives of the contesting trades and consider any arguments or facts they may present with respect to decisions or agreements of record or local practice. Clause 3 obligates the contractor to continue an assignment once made unless directed otherwise by the Board or with the agreement of the International unions involved. These procedures for making work assignments have been in effect and followed for many years in spite of any periods of uncertainty which the IJDB and its predecessors National Joint Board for the Settlement of Jurisdictional Disputes have experienced. They are reasonable procedures and, if followed, will contain the number of disputes arising from work assignments. The IJDB Chairman will investigate a claim that an original work assignment has been altered and by direction enforce the original assignment. The Chairman is in a position also to give direction and assistance to parties which are contesting particular work by advising them as to which trades the work belongs.

21. The significance of the Plan and its Rules and the procedural rulings of the IJDB was not lost on the International Association. When its General President wrote to the business agents in the United States and Canada he took pains to emphasize the importance for them to get the first work assignment of any work the International Association claims for its jurisdiction. Thus, if the assignment was disputed it would be preserved for the Association by operation of the IJDB's Rules and by decision and direction of its Chairman. It has since referred disputes to the IJDB for the enforcement of a contractor's original work assignment. The Sheet Metal Workers parent organization obviously does not think the IJDB ceased to function.

22. From the foregoing references to the Plan and its Rules, it may seem that they, together with procedural rulings made under the Plan, do contribute significantly to the stability of labour relations in the construction industry and it behooves this Board to support and encourage the proper application of the Plan and its Rules to the extent it has jurisdiction to do so. In that respect, the statutory requirement in section 91(14) that unions and employers do or abstain from doing anything required of them by the tribunal they have selected under the sub-section, in this case the IJDB' gives this Board clear authority to enforce the orders and directions of the IJDB made under the Plan and its Rules.

23. With respect to the second reason, if the Legislature had intended the Board to exercise supervision over the quality of the private, consensual disputes resolution methods adopted under section 91(14), it is the Board's view it would have said so in clear terms. It does so elsewhere in the Act with respect to two other important

disputes resolution provisions. Section 44, which requires that every collective agreement shall provide for final and binding arbitration of disputes arising under the agreement provides the Board with authority under sub-section 3 to modify the collective agreement provisions where they are inadequate. When the Legislature amended the Act to include section 124 allowing for the referral of grievances arising under construction industry collective agreements "Notwithstanding the grievance and arbitration provisions in a collective agreement . . .", it empowered the Board to supercede the private, consensual arrangements in collective agreements upon the request of either party to a collective agreement. Since the Board's general jurisdiction under section 91(1) is clearly proscribed by section 91(14), in the absence of language in section 91(14) permitting the Board to supervise the efficacy of the tribunal selected by the parties and in the absence of clear and convincing proof that the tribunal has ceased to function, there is no basis for the Board seizing jurisdiction. The evidence before the Board is that the IJDB continues to function. There is no basis in this complaint, therefore, for the Board to seize jurisdiction under section 91(1) and act as the tribunal of last resort to hear this complaint.

24. The Board does not see its decision that the IJDB continues to function as being inconsistent with the NLRB finding that the IJDB has been inoperative since June 1st, 1981. The NLRB was dealing in *Modern Acoustics*, *supra*, with the question of whether particular jurisdiction disputes were properly before it under section 10(k) of the *Taft-Hartley Act*. That section deals with disputes with respect to unfair labour practice charges and gives the NLRB the discretion not to hear a dispute if it has satisfactory "... evidence that [the parties] have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute.". It also provides that the charge shall be dismissed upon compliance with the voluntary adjustment of the dispute. The full text of the *Modern Acoustics* decision and of the footnote quoted above indicates that the NLRB was concerned with the IJDB's inability to police or administer its awards and the reference to its "inoperative status" was made in that context. This Board has the authority under section 91(14) to enforce the IJDB's awards or directions, therefore policing is not the same problem for it. More important, though, is the fact that the NLRB had jurisdiction to hear the dispute and was deciding whether to exercise a discretion to defer to a private process. Here the parties have adopted a private process protected by section 91(14). On the evidence, the IJDB which administers that process still exists as does a major part of the Plan under which it operates and its Rules are still in effect.

25. Much has been said before the Board in this case, and, as is apparent from the other decisions referred to herein, to other panels of the Board as well, about the potential for frustration of the purpose of section 91(14) and for disruption of the whole mechanism of this Act for preventing and resolving labour relations disputes which arise out of work assignments. Frustration with respect to the IJDB process is not new nor was the current situation with respect to the IJDB totally unforeseen by the parties who are stipulated to the Plan. The warning signs that the process was in difficulty have been around for some considerable time. If the parties had wanted to avoid the frustration which they attribute to the suspension of job decisions, they could have acted to adopt alternative procedures. They obviously chose not to seek an alternative. It is always open to the parties, within the constraints of the give and take of the collective bargaining process, to amend the provisions in their collective agreements to

take care of the apparent problem created by the IJDB not making job decisions. Nor do they have to await the expiry of the collective agreement for this to be done since section 52(4) of the Act accommodates "... revision by mutual consent ..." of a collective agreement during its term of operation.". For example, the Group and the Sheet Metal Workers were on the same side of the issue in this case and are bound to the same collective agreement. That agreement is between the Group and the International Association and its Ontario Sheet Metal Workers' Conference. The International Association and the Conference are the designated employee bargaining agency for the Sheet Metal Workers and, generally, its sister local unions in Ontario. Those parties could consent mutually to suspend or amend the provision in the agreement which requires referral of work assignment disputes to the IJDB while it is not making job decisions. If that had been done in their 1980-82 collective agreement, section 91(14) would not have been a bar to the Board inquiring into this complaint. While it was irrelevant and therefore not a factor in deciding the issue before the Board herein, it is interesting to note that the 1980-82 agreement was renewed without amending that requirement for the 1982-84 statutory term between the filing of this complaint and the final hearing. The Board notes, too, that the unions are in a position to act through their international organizations to restore the IJDB to making job decisions, to replace it with another mechanism or abandon it.

26. For all of the above reasons, the Board finds that the Impartial Jurisdictional Disputes Board, the tribunal to which the parties herein are required by their collective agreements to refer work assignment disputes for resolution, is still functioning within the meaning of section 91(14) of the Act, that it is making an important contribution to the stability of labour relations in the construction industry and that its status at the time this complaint was filed had not rendered nugatory those provisions in the collective agreements. Accordingly, they are required by their respective collective agreements to refer this work assignment dispute to the IJDB. In the result, the Board, pursuant to section 91(14) of the *Labour Relations Act*, lacks jurisdiction to inquire into this complaint.

0717-82-U Labourers International Union of North America, Local 697,
Complainant, v. **Tamarron Group Inc.**, Respondent

Practice and Procedure – Unfair Labour Practice – Complaint of non-compliance with unfair labour practice settlement agreement – Intervener withdrawing intervention at commencement of hearing – Parties settling complaint – Intervener subsequently not entitled to seek continuation of hearing

BEFORE: R. D. Howe, Vice-Chairman, and Board Members I. M. Stamp and H. Kobryn.

APPEARANCES: *S. B. D. Wahl, P. Little and R. Lester for the complainant; F. J. W. Bickford, J. M. Sinclair and Hans Toivonen for the respondent.*

DECISION OF THE BOARD; December 22, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant relies upon section 89(7) of the Act which provides:

“Where the matter complained of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers’ organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers’ organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).”

In particular, the complainant alleges that the respondent has failed to comply with the terms of the following written and duly signed settlement in respect of an earlier section 89 complaint filed by the complainant (Board File No. 2625-81-R) against respondents including Tamarron Group Inc., which was one of the signatories to that settlement:

[Memorandum of Settlement omitted]

• • •

2. The hearing of this matter commenced in Dryden on September 29, 1982 and continued on September 30th and October 1st. At the commencement of the hearing, Walter Dubinsky, a representative of Local 1669 of the United Brotherhood of Carpenters & Joiners of America (“Local 1669”) which had filed an intervention in these proceedings on August 4, 1982, advised the Board that Local 1669 had decided to withdraw its intervention and did not wish to enter an appearance. Accordingly, Local 1669 did not take part in these proceedings, although Mr. Dubinsky remained in the hearing room as an observer along with J.G. Pesheau, Business Manager and Recording Secretary of Local 1669, who had been summonsed by the respondent as a potential witness.

3. After Local 1669 had withdrawn its intervention, the Board heard the submissions of counsel for the complainant and counsel for the respondent concerning a number of preliminary matters. After recessing to consider those submissions, the Board made the following oral ruling (which has been incorporated into this decision at the request of counsel):

“The issue before us is a relatively simple one, namely, whether or not the respondent has contravened the Act by not complying with the terms of the written settlement dated June 1, 1982 in respect of the section 89 complaint in Board File No. 2625-81-R. While that issue has (work) jurisdictional overtones because of the wording of the settlement, this is not in substance a jurisdictional dispute. Our jurisdiction in this matter under section 89 of the Act is in no way removed by any proceedings before the I.J.D.B. [the Impartial Jurisdictional Disputes Board for the Construction Industry]. Moreover, we are not prepared to defer to proceedings under section 91 of the *Labour Relations Act* [no such proceedings having been filed], or to proceedings before the I.J.D.B. Indeed, we are of the view that the facts alleged by the respondent concerning I.J.D.B. proceedings are not relevant to the present case. Moreover, we are of the view that evidence concerning events covered by the complaint in File No. 2625-81-R cannot be adduced in these proceedings. In addition to the fact that such matters appear to us to be irrelevant to the issue before us, as a matter of labour relations policy we are not prepared to permit the complainant to indirectly litigate the complaint in File No. 2625-81-R by adducing such evidence in these proceedings. Indeed, we have grave doubts that evidence of anything that occurred prior to June 1, 1982 will be of any probative value in the present proceedings, although we will defer a final ruling on that matter until it arises in these proceedings, if it in fact does. The issue is not whether the respondent has restored the *status quo ante*, but rather whether the respondent has complied with the terms of the written settlement. It is questionable whether section 89(5) of the Act places a burden of proof on the respondent in these proceedings. However, we will reserve our decision on that matter pending final argument of this case on the merits. In the meantime, the Board, as master of its own procedure, will call upon the complainant to proceed first with its evidence in the circumstances of this case.”

4. Prior to the December 16, 1982 continuation of hearing scheduled in this matter, the parties filed with the Board the following “Minutes of Settlement”, signed by their respective representatives:

[Memorandum of Settlement omitted]

• • •

5. After those Minutes of Settlement had been filed with the Board and the Board had cancelled the continuation of hearing of this matter scheduled on December 16 and 17, 1982, in Thunder Bay, the Board received a letter from J. G. Pesheau, the

aforementioned Business Manager and Recording Secretary of Local 1669, in which Mr. Pesheau states that Local 1669 was "denied status before the Board in the proceedings and had to remain as observers". That statement is incorrect for, as noted in paragraph 2 of this decision, at the commencement of hearing of this matter on September 29, 1982, Local 1669, through Mr. Dubinsky, withdrew its intervention in these proceedings and declined to enter an appearance. Thus, it was unnecessary for the Board to make any ruling concerning Local 1669's status to intervene in these proceedings. In his letter to the Board, Mr. Pesheau asks the Board to "ignore" the December 8, 1982 Memorandum of Settlement between the complainant and the respondent and "to continue the hearings on the interpretation of the June 1, 1982 document, with Local 1669 Carpenters being granted status, in the matter." Having carefully considered that request and the other submissions contained in Mr. Pesheau's letter, the Board is not prepared to reject the settlement and proceed with lengthy hearings concerning a matter which neither the complainant nor the respondent wish to litigate. Having withdrawn its intervention, Local 1669 is not a party to these proceedings, nor is it appropriate for the Board to permit it to intervene at this late date, at a time when the parties to these proceedings, with the encouragement of the Board, have entered into a detailed written settlement of the complaint. Moreover, since Local 1669 is not a signatory to that settlement, neither that document nor this decision prevents Local 1669 from asserting any rights that it may have (concerning the matters dealt with in the Memorandum of Settlement) under a collective agreement, or under section 91 of the *Labour Relations Act*.

6. Having regard to the agreement of the parties, the Board, pursuant to section 89 of the Act, hereby directs the respondent to comply with the terms of the Minutes of Settlement dated December 8, 1982, as set forth above, including the Addendum thereto.

0351-82-R Ontario Public Service Employees Union, Applicant, v. Taylor Ambulance Service, Respondent

Employee – Whether supervisor exercising managerial functions – Person performing limited reporting role between owner and employees – Extent of authority not causing Board to exclude

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members R. J. Swenor and B. K. Lee.

APPEARANCES: *Barbara Linds and Lillian Seeger for the applicant; Thomas A. Stefanik for the respondent.*

DECISION OF THE BOARD; December 10, 1982

1. This is an application for certification in which the applicant was certified on an interim basis on June 9, 1982. There are approximately 4 full-time and 10 part-time employees in the unit, and only the owner, Mr. Taylor, has been agreed upon as an exclusion to date. The remaining issue is whether the “supervisor”, Mr. Tom Ball, exercises managerial functions within the meaning of section 1(3)(b) of the *Labour Relations Act*.

2. The respondent operates its ambulance service out of 2 depots, one in Queensville and one in Sutton, with 2 drivers regularly assigned to each depot (at least during the day shift). One of these drivers is Mr. Ball. The bulk of his time is spent driving and cleaning the ambulances, in the same way as the other employees do. As he says:

“My duties are exactly the same as theirs; it’s only I have a little bit extra to do as far as the book work, and make sure that the vehicles are maintained and that sort of thing”.

For these additional duties Mr. Ball receives 30 cents an hour over the rate of the other drivers. It is clear that Mr. Ball performs the normal functions of at least a “lead hand” or “group leader”. The question is whether his present functions and authority take him beyond that.

3. The respondent relies upon the following supervisory or administrative functions to justify the exclusion of Mr. Ball:

Hiring

Mr. Ball clearly becomes involved in the interviewing process, and takes prospective candidates out for a preliminary run in the ambulance. The extent to which he is actually involved in place of Mr. Taylor is not clear from the two passages contained in the report. The overall procedure appears to be set out at page 4 of the report, however, where Mr. Ball states:

Well, if we were in need of an employee, we'd have some employees come in for an interview. Quite probably I would be involved in the interviewing or maybe do some of the interviewing, and then they would see Mr. Taylor and we'd confer and sort of decide.

This passage suggests no more than a consultative approach between Mr. Taylor and his principal subordinate, without any real independent judgment on the part of Mr. Ball. There may have been one occasion (out of six) on which Mr. Ball actually notified the employee that he was hired, but there is no indication that Mr. Ball was acting other than on the instructions of Mr. Taylor in doing so. As an extension of the hiring process, Mr. Ball trains new employees as well.

Firing

There have been 4 firings during the five years Mr. Ball has been employed, and he was only involved with one of them. In that case, Mr. Ball's role consisted of passing on to Mr. Taylor the complaints of other employees regarding that individual. Employees complained to Mr. Taylor directly about the individual as well. At one point Mr. Ball discussed with the individual the problems that other drivers were having with him, and told him to "pull up his socks". Mr. Ball testified that he reported this discussion to Mr. Taylor, but had the impression Mr. Taylor had already made up his mind to terminate the employee.

Scheduling

The permanent rotation set up by Mr. Ball must be approved by Mr. Taylor, but the slotting of part-time employees to fill in for absences is done by Mr. Ball on his own. The latter function, however, appears to be a routine matter of contacting available employees from amongst an approved pool of part-time employees.

Administration

Mr. Ball spends a substantial period of his time looking after the logs and reports required by the government. He is the only employee in the unit with such bookkeeping responsibilities. There is no evidence of managerial discretion or authority in this regard, however. Closer to the issue before us is the fact that he verifies the number of shifts worked by employees for pay purposes.

4. More generally, counsel for the respondent acknowledges that the examples of managerial authority on Mr. Ball's part are limited. He acknowledges that Mr. Ball is not called upon to schedule overtime or grant time off, is not consulted on the annual budget, and has been ignored by Mr. Taylor when requesting increases in pay for the employees in the unit. But counsel points to the size of the unit and the fact that Mr. Taylor is only occasionally present at the work place, and argues that to the extent managerial functions *are* required, Mr. Ball is the one who performs them.

5. Of all Mr. Ball's responsibilities to date, the only one in the Board's view approaching the level of managerial conflict is the verification of employee time-cards. This, however, is not unheard of as a supervisory function for employees performing the role of a "lead hand" within a bargaining unit, and appears insufficient on its own to justify exclusion. Similar to the present case, the "lead hands", e.g., in *Rehau Plastiks*, [1979] OLRB Rep. Sept. 904, were involved in training as well as having responsibility in their departments for:

- (a) the quality and quantity of output;
- (b) general housekeeping and safety;
- (c) completing and submitting required reports;
- (d) verifying on employees' time cards the regular and overtime hours worked; and
- (e) security of the plant on the afternoon and night shifts and weekends.

The Board found these responsibilities to fall short of the kind of independent discretion required for a "managerial" exclusion.

6. The respondent relies upon *Metropolitan Toronto Association for the Mentally Retarded*, [1978] OLRB Rep. Nov. 1010. In that case, however, the Residence Supervisors had the responsibility for up to 16 employees, had full responsibility for staff scheduling, including the scheduling of overtime and granting of time off, and actually hired part-time employees on their own as required. They submitted formal evaluations to senior staff on a regular basis, and there was clearer evidence in that case of their recommendations being relied and acted upon. In fact, Mr. Ball in his more limited capacity appears closer to the *Assistant Supervisors* whom the Board found were *not* managerial in that case.

7. The Board, in conclusion, does *not* find that the managerial functions, to the extent that these are required, are presently exercised by Mr. Ball. Rather, the evidence demonstrates that Taylor Ambulance is essentially run as a one-man operation. The important decisions are left to Mr. Taylor, whether at the premises or not, and Mr. Ball generally appears to perform a necessary but limited reporting role between management and the employees. Mr. Ball does not, for example, have the authority to suspend someone on his own for the balance of a shift. As the Board has commented with respect to the role of, for example, a "head" nurse in charge of a shift in a hospital:

12. Also, the head nurse forms a conduit between the general staff on her floor and management, or to put it another way she has a reporting function. In this function she is a liaison between management and other employees; she enables management to "keep its ear to the ground" and in touch with the daily operations and functions of the hospital, and at the same time she is a part of the vehicle for management to convey policies and decisions to

other employees. Again, this reporting function should not be confused with the exercise of managerial duties. *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154.

While a significant delegation or sharing of responsibilities between the owner and single supervisor would not be unusual, it appears that in the present case the method of operation of this small unit has not made that necessary. The Board does not find that the extent of authority granted to Mr. Ball is sufficient to remove him from the scope of the Act, and finds him to be an "employee" within the applicant's proposed bargaining unit. See generally *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84; and cf. the *UCS Group* (unreported), Board File No. 0815-80-R, released March 2, 1981.

8. A formal certificate will now issue to the applicant as bargaining agent for:

All employees of the respondent in the Town of Sutton and the Village of Queensville, save and except office staff and owner/operator.

0992-82-R Concetta Fallico et al, Applicants, V. International Ladies' Garment Workers' Union, Respondent, v. **Third Dimension Mfg. Ltd.**, Intervener

Petition - Termination - Employees quitting work during work hours and leaving en masse to sign petition - Management standing by making no inquiry - Employee perception making petition involuntary

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and C. A. Ballentine.

APPEARANCES: Michael G. Horan and Concetta Fallico for the applicants; A. M. Minsky, S. Tatrallyay and Tom Abrahams for the respondent; E. L. Stringer, Q.C. for the intervener.

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER C. A. BALLENTINE; December 14, 1982

1. This is an application for a declaration terminating bargaining rights, pursuant to the provisions of sections 57(2) and (3) of the *Labour Relations Act*. The intervener employer is a manufacturer of knitwear, and occupies three floors of a building on Adelaide Street West in the City of Toronto. The employer filed an intervention and was represented by counsel at the hearing, but did not otherwise appear before the Board in this matter.

2. The evidence in support of the application was given by the two leading petitioners, Concetta Fallico and Julie Turnbull. They testified that they had become

dissatisfied with what the trade union was doing for them, and with having to pay \$8.50 a month in union dues. Mrs. Turnbull in particular had been a member of the union's bargaining committee but had resigned in disgust during the most recent set of negotiations because she did not feel that the union was getting anywhere. The evidence is that all of the employees talked about their dissatisfaction with the union together, but that no one had any knowledge of what to do about it. Mrs. Fallico testified that she went to see her friend and neighbour, Mary Iorfida, who was educated in this country, about the problem, and that Mrs. Iorfida told her that she would have to go to the Labour Board to find out what papers were necessary. Mrs. Fallico says that she reported this back to the other employees, and that Mrs. Turnbull volunteered to go to the Board, because she spoke English (the bulk of the employees speak either Italian, Portuguese or Chinese). In contrast, Mrs. Turnbull testified that it was her own idea to go to the Labour Board to find out how to terminate the union, that she knew that you had to go to the Labour Board to find something like that out, and that no one, including Mrs. Fallico, had to tell her. It might be noted here that all witnesses except Mrs. Fallico were excluded from the hearing other than while testifying.

3. In any event, Mrs. Turnbull, together with another employee who was Portuguese, attended at the Labour Board one day to obtain information. Mrs. Turnbull presumably was told that she had to fill out a form, that other employees had to sign a statement in front of a witness, and that she would ultimately have to attend at the Board for a hearing. Unfortunately, Mrs. Turnbull took what was said to mean that the other employees were required to sign the statement in front of someone at the Labour Board, and to attend the Board hearing. This is of course *not* necessary, and Mrs. Turnbull's misapprehension was unfortunate, but this is what she reported back to the other employees at the plant. Sometime thereafter, it was decided that August the 10th would be the day that employees would attend at the Board to sign their statement. And that is what they did. What is significant, however, is the manner in which the employees left the plant. August 10th was a working day. Shortly before 10 o'clock that day some 68 employees, being approximately three-quarters of the bargaining unit, downed their tools, got dressed, and punched out. The petitioners Mrs. Fallico and Mrs. Turnbull testified that they did not ask permission from anyone in the company to leave, nor, to their knowledge, had anyone else. Mrs. Turnbull's own supervisor watched her leave, but said nothing. The petitioners testified that they had no idea how long they would be gone, and were not concerned about it. Mrs. Turnbull testified that the employees got up to leave on the spur of the moment, and that no one came around to tell them when to go. She later qualified this by saying that there may have been a rumour circulating in the factory since 9:30 that this was the day they were going.

She said it took the employees approximately 5 to 10 minutes to go through the process of putting their tools away, dressing, and punching out. Mrs. Fallico, on the other hand, testified that the departure on the 10th was arranged at lunchtime on the day before, with her and other employees circulating amongst the employees on each of the three floors to advise them of the time for departure. In any event, the employees left work at 10 o'clock and walked as a group from Adelaide Street to the Labour Board, completed their petition, and returned to the factory sometime after 12 o'clock. Some punched back in at that time, others waited until the end of the lunch-hour at 1 p.m. Once again the petitioners testified that no one from management asked them any questions when they returned, nor did they see anyone else being asked. But to the end

of their testimony both petitioners denied that management had any idea what the employees were doing that morning.

4. It should be noted that counsel for the petitioners was at the disadvantage of having been retained not only after the first day of hearing, but at a point where Mrs. Fallico, who retained him, was still in the course of completing her cross-examination. Counsel therefore exercised his own discretion in keeping his discussions with Mrs. Fallico to a minimum. Mrs. Fallico was immediately followed on the witness stand by Mrs. Turnbull. In examination in chief, counsel posed to Mrs. Turnbull the following questions with respect to the August 10th exodus:

How did you come to be off work that day?
I punched my clock.

Did you tell your supervisor where you were going?
No.

Did your supervisor ask?
No.

How long were you away?
Approximately an hour.

Did you have any discussion with your supervisor as to where you went?
No.

Are you allowed to punch out and go off whenever you want?
Sure.

Are you on piece work?
No.

Are you paid by the hour?
Yes.

Are you paid for time out?
No.

Later in the examination counsel returned to the question of Mrs. Turnbull's supervisor (Rosanna) watching her leave, and asked the following questions:

What did Rosanna say when you got up and left?
Nothing. That's not her business.

When did you come back?
I came back before lunch.

Did Rosanna come up and ask you where you had been?
No.

Did you see her come up and ask any others?

No.

Do you have any explanation for that?

It was not a part of her business. Rosanna doesn't pay her dues.

Did she know where you were going?

No.

Of similar interest are the answers which the initial petitioner, Mrs. Fallico, gave to Union counsel on cross-examination:

Were you concerned how long you would be away that day?

Why should I be worried?

Did you think it would make any difference to anybody?

I don't think so.

Were you not concerned that the company might be unhappy to have so many people leave?

How could I know?

I'm asking you if you cared.

I cannot say. I don't know what the company was thinking.

But you weren't concerned?

No. Whatever we wanted to do, we did it voluntarily.

Mrs. Fallico went on to concede that it is normal for someone who is going to be absent due to sickness or a doctor's or dentist's appointment to let the company know. She added that it has not always been possible to phone the company at the time, and that in circumstances such as that, nothing has happened.

5. Subsequent to August 10th, an additional 7 employees who had been on holiday approached Mrs. Fallico and signed her petition. Mrs. Fallico testified that none of this occurred during working hours, but rather was all done in the morning or at lunchtime. Union counsel then asked why it was not done during working hours. Mrs. Fallico responded: "Because during your working hours you have to work".

6. The only witness called by the respondent trade union was Mr. Daniel Ubogi. Mr. Ubogi had been employed at Third Dimension as a cutter without interruption for 2½ years. He was an active union supporter from the start, and a member of the union's negotiating committee. He testified that the owner, Mr. Milton Wallace, called him into his office around April or May of 1982 and indicated that he did not want the union in the shop. He says Mr. Wallace suggested that Mr. Ubogi ought to go to the Department of Labour and find out what papers were needed to get the union out. Mr. Wallace is alleged to have added that if Mr. Ubogi lost any time, he would be paid for it. Mr. Ubogi went on to testify that he was subsequently approached by a second senior management person, Mrs. Seville Pollack, with the same suggestion. He says he

told both of them that he did not know if he could do that. Mr. Ubogi acknowledges that he told no one about these approaches at any time prior to August 11th. On August 10th, after the bulk of the employees left to go to the Labour Board, Mr. Ubogi says that Seville Pollack came out on the floor and looked around the corner where Mr. Ubogi works to observe which of the employees had remained at their tables. He added as well that the foreman was sitting at his usual table next to the time-clock when the employees punched out. The evidence of Mr. Ubogi was not contradicted.

6. The principles applicable to this kind of termination application have been stated by the Board many times, with necessary attention to the words employed by the Legislature in drafting these sections of the Act. The Act provides:

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

• • •

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have *voluntarily* signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

(emphasis added)

The use of the word "voluntarily" in the section makes it necessary for the Board in every case to satisfy itself that the petition or statement filed in support of the application represents a reliable expression of employee wishes, reasonably free from a concern that their expression one way or the other will come to the knowledge of their employer. On the other hand, employer knowledge that a petition is being taken up against the union, or the recognition by employees that an employer would prefer to be without a union, are not in themselves matters which disturb the Board. See *Parkers Dye Works and Cleaners Limited*, [1974] OLRB Rep. Dec. 859, at paragraph 37; *Cooper Weeks Limited*, [1967] OLRB Rep. Aug. 455.

7. In addition, the Board has noted the practical distinction which time and other intervening factors may create in assessing a petition which accompanies a termination application, as opposed to one which arises at the time of initial

certification. In *Northern Telecom Canada Limited*, [1979] OLRB Rep. Apr. 330, for example, the Board cited an earlier comment in *N. J. Spivak Limited*, [1977] OLRB Rep. July 462, as follows at paragraph 10:

Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, [now 57], the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application filed under section 49 of the Act.

The Board is still required, however, to make an objective finding of “voluntariness” of the statement on the basis of the evidence which it has before it. In the *Northern Telecom* case itself, for example, the Board went on in the following paragraph to state:

The Board must decide if the signing of this statement on company premises and with supervisors in the general vicinity on the morning of February 19th was done in such circumstances as would cause a reasonable employee to conclude that management was involved and might become aware of who signed and who did not. If the Board makes this finding it would make the further finding that the statement does not represent the true wishes of those who signed.

8. Where the petition activity in fact takes place during working hours, the Board has noted that mere indulgence on the part of management may be sufficient to destroy the petition as a reliable expression of the employees’ own wishes. This is because, once again, employee perception is the key, and a “hands-off” approach by management in circumstances where that would be unusual can convey to employees, deliberately or otherwise, that management is somehow connected to the petition. As the Board observed in *Ontario Hospital Association (Blue Cross)*, [1980] OLRB Rep. Dec. 1759, at paragraph 36:

The only problem with [even an innocent] employer deciding as a blanket policy to take “two steps back” is that, depending on the circumstances, it may create a misperception of management involvement which becomes fatal to the petition.

9. In *Morgan Adhesives*, [1975] OLRB Rep. Nov. 809, the Board found that the unimpeded circulation of a petition during working hours, in circumstances where the employees themselves would feel management knew what was going on, was fatal to the petition:

31. In the instant case all but two of the seventy-two signatures appearing on the petition were affixed on company premises and during working hours. This fact is not of itself fatal to the petition. The evidence taken as a whole however, supports the inference that the employees of the respondent company would logically have

assumed that management supported the petition, albeit in a tacit manner, and that the names of those refusing to sign the petition would become known to management.

10. In *Armatage Motors Limited*, [1970] OLRB Rep. Apr. 69, the Board found the following:

3. In this matter a statement of desire was filed. It appears that during the course of working hours the persons who signed the statement of desire received permission from their foreman to leave the premises whereupon they left the premises as a group and attended at their lawyers office for the purpose of signing the statement of desire.

4. Since the Board is concerned with the voluntary wishes of the employees we are of the opinion that in these circumstances any employee who remained on the premises while the remaining employees left the premises to sign the statement of desire, would be subject to the scrutiny of the foreman. In these circumstances it would have been extremely difficult for an employee to refuse to attend to sign the statement of desire knowing that such refusal might come to the attention of management. In addition it would appear that permission having been obtained for an on behalf of these employees that the employees would be under the impression that management approved and consented to their actions. In these circumstances we are not prepared to accept the statement of desire as reflecting the voluntary wishes of the employees.

And similarly in *Hobart Brothers of Canada Limited*, [1974] OLRB Rep. Feb. 85, the Board stated in part:

5. The petition was prepared by the objector's lawyer subsequent to the posting of the Notice of Application for Certification provided by the Board. The petition was signed in the respondent's cafeteria during working hours by employees who in turn left their respective work stations without seeking leave of their supervisor and without question or hindrance by anyone in management. This forbearance by management can only have been interpreted by the employees as silent acquiescence in the use of its premises and time by the committee.

6. In the circumstances outlined above, it is plain that the refusal of any employee to at least go to the cafeteria would have been a clear betrayal of such an employee's position with respect to the petition as indeed would have been a refusal to sign once an employee had yielded to the virtually compulsory attendance in the cafeteria.

12. The bulk of the cases just referred to were certification cases, but the problem that the Board was faced with is too fundamental to be ignored even on a

termination application. There is no evidence before the Board that a single supervisor or member of management made any inquiry of employees either before or after the fact of their mass departure from the workplace in the middle of the working day. On the contrary, the evidence that the Board does have indicates that no inquiries were made. This demonstrates beyond a doubt to the Board, as it must have to the employees at the factory, that management was fully aware of the reasons for the departure that day, and sanctioned it. And, more importantly, it would have been equally obvious to employees at the time that their decision to support or not to support the anti-union activity would be manifestly apparent to the company, both by the physical presence of dissenters remaining in the workplace, as well as by a subsequent review of the time cards to confirm who had not punched out. The employees were, in other words, literally being asked, in front of their employer, to "stand up and be counted". This kind of pressure may well be withstood by employees of particular fortitude or conviction, but on the whole must have the effect of undermining the "voluntariness" of employee conduct, insofar as such conduct is to have any reliability for the Board in ascertaining employee wishes. Once this open declaration of support was solicited, and recognizing the linkage between management and the petition which the circumstances must have forged in employees' minds, the Board does not find it surprising that all of those who attended at the Labour Board on August 10th were prepared to affix their signatures to the petition, and to again declare themselves by attending the Labour Board hearing en masse, as they unfortunately believed they were required to do. The polling of employee wishes under circumstances such as these does not, under the scheme of the Act, cause a trade union's bargaining rights to be put to the test of a representation vote.

13. As well, the natural inferences in this case are so overwhelming that the continued denials of the petitioners, Mrs. Fallico and Mrs. Turnbull, of management's knowledge, or of their assumption of management's knowledge, only serve to undermine their own credibility. And if the Board finds, as it does, that it cannot believe the petitioners, there remains no evidence whatsoever upon which the statement of desire can satisfy the onus of voluntariness. Compare *Canadian Gypsum Limited*, [1980] OLRB Rep. Oct. 1368; *Textrim Limited*, [1980] OLRB Rep. Nov. 1702; *Leamington Vegetable Growers*, [1974] OLRB Rep. June 402.

14. For the foregoing reasons, the Board finds that it can give no weight to the statement of desire filed in support of this application, and the application is dismissed.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. I would have thought the natural human reaction of an employee who is pressured by an employer to sign a petition would be to look for an opportunity to retaliate and that employers would be cognizant of this potential.

2. In my view even employees who were not particularly sympathetic to a labour union which represented them would be inclined to resent employer attempts at interference and to express that resentment at the earliest and safest opportunity.

3. What better opportunity could there be to retaliate than in the protected atmosphere of a government-supervised secret ballot?

4. It is reasonable to assume that votes are conducted by the government in a manner such that even employees who may have no understanding of the legislation or their rights must recognize that the secrecy of their ballot decision will be fully protected by the authority of the State.
 5. It follows that interference of an improper nature by an employer would be counter-productive in that it would only serve to solidify union support. By the same token, serious labour relations consequences can also result when the Board errors in its perception of the wishes of a substantial group of employees, even if they represent a numerical minority of the bargaining unit, for they too are entitled to suspect that their view would attract majority support in a secret ballot vote. Those whose petition has been disallowed, and who thus *have been denied a vote on the basis of representations from the union claiming to represent them*, will distance themselves from union supporters and the issue will continue to fester.
 6. I cannot disagree with the majority in their recitation of the facts and their conclusion that the employer probably knew what was going on, nor with their reservations as to the credibility of some of the petitioners. However, I cannot help but think that the pre-occupation of the Legislature is to provide means whereby the voluntary and true wishes of employees can be determined at the time of application, as well as at subsequent intervals after bargaining relationships have been established.
 7. Perhaps in the infancy of union/management relations in Ontario it was appropriate for the Board to adopt a paternalistic and condescending attitude towards employees by conducting witch-hunts into the origination, circulation and custody of petitions on the grounds that the "spectre of an all-powerful employer would follow them even into the sanctity of a government-supervised polling booth" (I here paraphrase *obiter* from an earlier decision which seemed to view Canadian society as an ongoing class struggle). In the Canada of 1982, however, I would place much more confidence in the ability of individual employees to make up their own minds even in the face of pressures from either side, be they subtle or overt.
 8. I would view a petition for a certification vote in the same light. As long as we had before us identifiable signatures of a number sufficient to satisfy the *union* that a vote was worthwhile, I would be disposed to so order. I would not require that the signatories be members of the union or have made application for membership. I would not require evidence as to how the signatures had been obtained and I would not require that monies have been paid and receipted as evidence of the employees' desire to have the union represent them. The mere existence of the petition supporting the union and calling for a certification vote would be sufficient to entitle the employees and the union to an expeditious vote and, as a minimum, interim certification, assuming the results warranted and the union so requested.
 9. Given this view of petitions as mere triggering devices to the dispositive event of a secret ballot vote, I would not apply the Board's current tests of voluntariness and would therefore have directed a vote in this case.
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2645-81-R; 2664-81-R United Food and Commercial Workers International Union Local 1000A AFL-CIO-CLC, Applicant, v. Keele-Wilson Supermarket Limited c.o.b. as **Tops Food Market**, Respondent, v. Group of Employees, Objectors

Representation Vote – Practice and Procedure – Alleged violation of silent period – Present Board policy to set aside vote for breach of silent period only in limited circumstances – Concurring opinion questioning usefulness of silent period rule – Urging Board to dispense with rule [Vice-Chairman N.B. Satterfield’s decision published at [1982] OLRB Rep. Aug. 1216]

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and S. Cooke.

CONCURRING OPINION OF BOARD MEMBERS, W. H. WIGHTMAN AND S. COOKE; December 3, 1982

1. We concur with the decision of the Board issued August 16, 1982 but we would like to add some additional comments regarding the Board’s policy with regard to the “silent period” rule.

2. A review of the Board’s decision on the issue of the consequences of breaches of the silent period reveals that the Board has become progressively more reluctant to order a new representation vote when a merely “technical” breach is shown. Originally the Board treated the silent period rule as an “absolute prohibition”, breach of which would invariably result in the ordering of a new vote regardless of whether the violation had any effect on the outcome of the first vote or whether the impugned conduct came about through the fault of the respondent party: *Rogers Majestic Ltd.* 48 CLLC ¶16,517; *Stauffer Dobbie Manufacturing Co. Ltd.* 59 CLLC ¶18, 147. In later cases the Board departed from this species of absolute liability approach and allowed parties charged with breaches of the silent period to raise a defence of due diligence, i.e. that they had taken “reasonable precautions” to avoid the breaches that occurred: see *Addressograph-Multigraph* [1968] OLRB Oct. 752 for a review of this line of cases. In subsequent cases the Board also examined the alleged violations in order to determine whether they were likely to influence the outcome of the vote and refused to order a new vote if this was not the case. Thus the early absolute liability approach was qualified by requiring the applicant party to demonstrate a probable impact on the result of the vote and by allowing the respondent to argue that it took reasonable precaution to avoid the violations which occurred. This double barrelled restriction of the silent period rule is well expressed in *Kimberly-Clark Ltd.* [1977] OLRB Rep. Sept. 599 at paragraph 9,

Obviously, it would unduly prejudice the parties to a representation vote if the vote could always be automatically invalidated by virtue of breaches of the silent period by persons whose conduct is beyond the parties’ reasonable control. Having found a disregard of the silent period the Board therefore must ask whether the party concerned took reasonable precautions to avoid or prevent any breach. If it is satisfied that the party has exercised the necessary

care and that the breaches are neither so serious nor so widespread as to call into question the results of the vote, the Board will allow the vote to stand. Where it is found that isolated infractions are the work of rank and file employees who are not under the control of the union and that the union did all that can be reasonably expected to prevent those breaches, the Board may decide not to disturb the vote. (*Rheem Canada Limited*, [1965] OLRB Rep. July 284; *Marsland Engineering Limited*, [1972] OLRB Rep. Dec. 1009.)

This test for determining when a breach of the silent period will result in the nullification of the first vote and the ordering of a second vote was approved and adopted in the recent case, *Treco Machine and Tool Ltd.* [1981] OLRB Rep. Oct. 1503.

3. In *Chateau Gardens* [1977] OLRB Rep. Jan. 12 the Board further restricted the effect of the silent period rule by holding that a party must file charges relating to violations of this rule as soon as possible rather than awaiting the outcome of the vote in order to see whether or not it is favourable:

8. The Board finds that the CLAC was under a duty to exercise some dispatch in the filing of its charges once it became known that another party to the dispute was in breach of the Registrar's direction. The Board is of the view that the purpose of the imposition of the silent period is to prevent any one party from gaining an unfair advantage with respect to electioneering. If the circumstances described to the Board in the CLAC's evidence was true and had due diligence with respect to the wrongdoings being exercised, then adjustments could have been made to correct the alleged shortcoming. In other words, it does not lie in the mouth of a party to exploit to its own advantage a rule that was designed to assure fairness in the conduct of the vote. We find that a party cannot "lie in the bushes" and await the outcome of a vote and when it learns that the result was not amenable to its liking seek a second representation vote on the basis of a breach of a rule that could have been brought to the Board's attention in advance of the taking of the vote. (See: *R: Pure Spring (Canada) Ltd. et al* case, an unreported decision of The High Court per King J., dated February 21, 1965.)

9. In the normal circumstances, had due diligence been exercised in the filing of the allegations, the Board may very well have directed that the ballot box be sealed pending the disposition of the evidence filed in support of the charges. Or, the Board may very well have dispatched a Labour Relations Officer to investigate the respondent's premises and upon those findings the Board may very well have cancelled the holding of the vote and scheduled it for another day to permit prejudiced party to recoup what lost advantage had accrued as a result of the impugned electioneering. Whatever the adjustments that could have been made prior to the holding of the vote, we are satisfied that the CLAC's conduct in

delaying the filing of the charges until after an unhappy result was known deprived the Board of any such opportunity. The Board is confident that our rules were not designed to allow a party in these circumstances to have "two bites of the cherry" where one may have sufficed. As a result, the Board is satisfied having regard to all of the evidence and the ensuing concerns with respect to continued viable collective bargaining that the CLAC ought to be foreclosed from filing its objections. (See: *Lecours Lumber Company Ltd.* case [1972] OLRB Rep. Nov. 982.)

4. From this brief review of the Board's jurisprudence on the silent period it can be seen that the Board has gradually narrowed the silent period rule in order to avoid the delay and other costs associated with repeat representation votes and the litigation that accompanies such votes. Indeed, the primary thrust of these cases is a mounting concern that the silent period is being used as a pretext by parties who merely wish to delay and obstruct proceedings before the Board. In the *Treco* case, *supra*, the Board Members Wightman and Hodges questioned the continued utility of the silent period rules and suggested that the Board dispense with this practice altogether. We would like to emphatically reiterate this suggestion. The utility of the silent period is clearly outweighed by its inconveniences. (Indeed it is questionable whether the silent period serves any useful purpose. It would seem that the silent period is merely an anachronistic hangover from the infancy of labour relations law in Ontario when the government adopted a basically paternalistic attitude towards employees.) Furthermore, there are alternative methods of attaining the objective of the silent period, namely to ensure that employees are able to express their true wishes in a representation vote. The Board clearly has ample powers under the *Labour Relations Act* to remedy any conduct preceding a vote which potentially distorts the outcome of the vote. Nothing is gained by imposing a blanket prohibition on campaigning for three days before the vote and much is lost in terms of increased potential for costly and time-consuming litigation. Therefore we urge the Board to cease its practice of ordering the imposition of a silent period under section 68(j) of its Rules of Procedure.

1252-82-U International Association of Machinists and Aerospace Workers, Complainant, v. **Treco Machine & Tool Limited**, Respondent, v. Group of Employees, Interveners

Duty to Bargain in Good Faith – Interference in Trade Unions – Practice and Procedure – Remedies – Unfair Labour Practice – Employer requiring employee ratification as condition of signing agreement – Bad faith bargaining and attempt to avoid bargaining agent – Employer directed to sign agreement – Employees party to separate termination application given standing to participate in hearing

BEFORE; Kevin M. Burkett, Alternate Chairman and Board Members J. A. Ronson and H. Kobryn.

APPEARANCES: *Maurice A. Green, Len Froggatt and Joyce Holden for the complainant; B. R. Baldwin, W. S. Cook, Lou Trembl and Gary Alexi for the respondent; Robert Adourian for the interveners.*

DECISION OF THE BOARD; December 7, 1982

1. This is a complaint filed under section 89 of the *Labour Relations Act* in which it is alleged that the respondent employer has violated sections 15, 64 and 66(a) of the Act. More specifically, it is alleged that the failure of the employer to execute a collective agreement containing the terms and conditions set out in the employer's last offer constitutes a breach of the duty to bargain in good faith and unlawful interference with the trade union.

2. The complainant asks the Board to direct the respondent to enter into a collective agreement effective from September 13, 1982. There is a termination application before the Board which was filed on October 19, 1982. Counsel representing the employees who are seeking to terminate the union's bargaining rights appeared at the hearing in this matter and asked to be given status to participate. In the normal course, the Board would refuse to accord individual employees party status in a complaint of this type brought by the union against the employer. (See *Re Canadian General Electric*, [1980] OLRB Rep. Aug. 1179). However, where, as in this case, the relief sought by the union, if granted, would create a bar to the termination application brought by the employees seeking to participate in these proceedings, we concluded that their interests are potentially affected to such an extent as to allow them to participate as an interested party. We hereby confirm our oral decision to allow the employees who have filed the termination application in respect of the complainant's bargaining rights and who stand to be adversely affected by the outcome of this matter, to participate as an interested party in these proceedings. These employees who were represented by counsel, cross-examined witnesses, called their own evidence and made submissions on the issues before us.

3. The complainant was certified as the bargaining agent for the employees of the respondent, following a pre-hearing vote, on October 13, 1981. The complainant won the election by a single vote. The complainant served the respondent with notice of its desire to bargain for a first agreement by letter dated October 15, 1981.

Negotiations took place over an extended period and on June 24, 1982, Mr. W. Cook, the respondent company's representative in the negotiations, provided the union with a "last proposal" by letter of that date. The letter reads in part:

"If this proposal is accepted by the majority of the employees at a fairly conducted meeting, I am instructed to inform you that the principals of the company will consider whether or not to ratify it."

Mr. Froggatt, the Directing Business Representative of the complainant union, complained to Mr. Cook about the apparent uncertainty of the company ratification of its own proposal. Mr. Cook replied by letter dated July 6, 1982 that:

"(1) The company will ratify the agreement if it is satisfied that it was properly ratified by the employees; and

(2) The term of the agreement will be one year from the date of ratification."

4. Article 3.03 of the collective agreement proposed by the company stipulates:

"The union agrees that the total bargaining unit as set out in this Article will participate in the ratification of the collective agreement."

5. The union conducted a ratification meeting on August 30, 1982. The notice of the meeting read in part that "... all hourly paid employees have the right to vote on the company's final offer." The company's offer was explained to those present and, by a vote of 52 to 19, the offer was rejected. Mr. Froggatt testified that, in accord with the union's constitution, he then decided to conduct a strike vote and explained to those present that if there was not sufficient support for a strike the union would enter into a collective agreement with the company on the terms set out in the company's offer of settlement; the same offer that had been rejected by the employees a few minutes before.

6. Mr. Nishan Atikian and Mr. Norman Bain, two of the employees seeking to terminate the complainant's bargaining rights, testified that the employees who attended the ratification meeting were not told in advance of the ratification vote that if they did not ratify there would be a strike vote and if they did not vote to strike the union would enter into an agreement on the basis of the last company offer. Mr. Bain voted against the proposed contract although he testified that he is happy with his terms and conditions of employment. He also voted not to strike. Mr. Atikian testified that he too is satisfied with his terms and conditions of employment and no matter what the union did he does not want the union to represent him. He also voted to reject the offer and not to strike. Mr. Froggatt testified that he informed those present prior to the taking of the strike vote that the union would sign a collective agreement if the employees were not prepared to strike.

7. Mr. Froggatt advised the company following the meeting on August 30th, that the union was prepared to sign an agreement on the basis of the company's last offer.

He was referred to Mr. Cook and spoke with him on September 7, 1982. He confirmed that conversation by letter of the same day which reads:

"This letter will confirm our telephone conversation of September 7, 1982 advising you that the union will sign the collective agreement as presented at conciliations plus your letter spelling out the one year term from date of notification.

Would you be kind enough to prepare the documents for signing as soon as possible."

Mr. Cook replied by letter dated September 13, 1982 as follows:

"I have been instructed to inform you that the condition for acceptance of the contract has not been met. In this regard, I would refer you to my letter of June 24, 1982 and article 3.03 of the draft agreement."

Mr. Froggatt replied in turn by letter dated September 27, 1982, enclosing copies of the agreement proposed by the company signed by the union. His letter reads:

"Further to your letter of September 13, 1982, please find enclosed the collective agreement signed by the legal representative and negotiating committee pursuant to our letter of September 7th, 1982.

We consider that conditions in your letter of June 24, 1982 and your first condition as stated in your letter of July 7, 1982 to be illegal and to be bargaining in bad faith and we therefore will take action accordingly unless we receive the enclosed Collective Agreement duly signed by the company within 48 hours after receipt of this letter."

The company did not sign the document and the union in turn launched these proceedings.

8. Mr. Cook testified on behalf of the respondent company. He testified that the company included article 3.03 in its proposed collective agreement because of the unsettled condition in the plant. He testified that the vote to certify the union had been very close and that there was a split in the shop so that the company wanted to be certain that the agreement was one accepted by the employees. He testified that "the company wanted to be satisfied from day one that its offer would be taken to a fairly conducted vote - to show support for the agreement as made." He maintained that he was shocked when informed of the procedure followed by the union at the ratification meeting with the "various votes and rejections". It is his evidence that in the result, the company refused Mr. Froggatt's request to sign the proposed collective agreement.

9. The union argues that the incorporation of a clause into the company's final offer that the offer be ratified by the entire bargaining unit is both an unlawful demand,

which constitutes a breach of section 15 of the Act, and an act of unlawful interference in the administration of the trade union contrary to section 64 of the Act. The union maintains that the testimony of Mr. Cook establishes that the company is attempting to deny the existence of the union by reaching over it to the individual employees in the unit. Furthermore, it is the position of the union that the company is attempting to support those who were opposed to the Union by refusing to sign an agreement based on its last offer of settlement. The company asks the Board to direct the respondent to enter into a collective agreement effective from September 13, 1982. The union cites *Wilson Automotive*, [1980] OLRB Rep. Sept. 1337, *Casimir, Jennings and Appleby*, [1978] OLRB Rep. June 507, and *Fotomat Canada Limited* [1981] OLRB Rep. Feb. 145 in support of its position. The union maintains that the existence of an application for termination of bargaining rights is irrelevant to both the Board's determination with respect to alleged breaches of the Act and to the claim for remedial relief by the union.

10. The intervening employees, through their counsel, argue that the union acted contrary to the instructions of those in the bargaining unit when it attempted to enter into a collective agreement. In these circumstances, counsel for the intervening employees, while acknowledging the authority of the Board to direct the company to enter into a collective agreement effective from a specified date if satisfied of a breach of section 15, argues that in this case it would not be fair to the employees seeking to terminate the union's bargaining rights to frame a remedy which would have the effect of preempting the termination application.

11. The company argues that this case should be distinguished from the cases relied upon by the union on the grounds that there is no history of egregious unfair labour practices by the company, that the requirement to ratify as contained in article 3.03 has been present from the outset and was clearly not added to force the matter to impasse, and finally, that a termination application has been filed in this matter. The company maintains that where, as in this case, it has legitimate concerns as to the possible impact in the work place if it entered into a collective agreement without employee concurrence, it is entitled to incorporate article 3.03 as a condition of settlement. Furthermore, where, as in this case, the union seeks to execute a collective agreement which lacks employee support, the company argues that it is entitled to refuse to sign that agreement. The company argues in the alternative that even if the Board finds a breach of the Act, it has a broad discretion with respect to the exercise of its remedial authority and should not, where the union has flouted the will of the majority, frame a remedial response which has the effect of barring the termination application.

12. Our determination in this matter begins with a discussion of the purpose and legal effect of certification under the *Labour Relations Act*. Trade unions are not permitted to strike in an attempt to secure recognition. Rather, the Act, in furtherance of the purpose of encouraging the practice and procedure of collective bargaining, contains an elaborate statutory scheme for the selection by employees of a bargaining agent of their choice. This scheme is based on an application of the majority principle. The Board is given the authority under the Act to determine trade union status, to determine the appropriate bargaining unit on a case by case basis and to determine if a trade union has the support of a majority of those in the bargaining unit. Majority support is determined by means of a secret ballot vote by those within the bargaining

unit, as in this case, or, as is more often the case, on the basis of the signed evidence of membership of those within the unit submitted by the union in support of its application. If the Board is satisfied that the applicant is a trade union within the meaning of the Act and that it has the support of a majority of those within the unit, it is certified by the Board as the exclusive bargaining agent for all of the employees in the bargaining unit. The certificate thus issued alters the legal relationship between the employer and the employees in the bargaining unit. The employer is no longer permitted to deal with the employees in the bargaining unit on an individual basis but must deal with the trade union as the certified bargaining agent of all of the employees in the unit.

13. The exclusivity of the union's bargaining rights, as conferred by a Board certificate, and the requirement upon the employer to deal with the union, as the certified bargaining agent, and not to go behind the certificate, has received extensive judicial support. In *Re Syndicat Catholique des Employes de Magasins de Quebec Inc. v. Compagnie Paquet Ltee* (1959) S.C.R. 206, 18 D.L.R. (2d) 346, the Supreme Court of Canada expressed the concept in these words:

"The union is, by virtue of its incorporation under the *Professional Syndicates' Act* [R.S.Q. 1941, c. 162] and its certification under *The Labour Relations Act* [R.S.Q. 1941, c. 162A], the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statutes. The terms of employment are defined for all employees, and whether or not they are members of the union, they are identical for all."

In *McGavin Toastmaster Ltd. v. Ainscough* [1976] 1 S.C.R. 718, [1975] 5 W.W.R. 444, 75 CLLC ¶14,277, 54 D.L.R. (3d) 1, Laskin C.J.C., speaking for the majority in another judgment of the Supreme Court of Canada stated:

"The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reasons of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties

thereto. To quote again from the reasons of Judson J. in the *Paquet* case, *supra*, at p. 214:

'If the relation between employee and union were that of mandator and mandatory, the result would be that a collective agreement would be the equivalent of a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees. This seems to me to be a complete misapprehension of the nature of the juridical relation involved in the collective agreement. The union contracts not as agent or mandatory but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the terms.'

(See also *Winnipeg Police Association and City of Winnipeg*, [1979] 5 W.W.R. 193.)

14. This Board has dealt with a number of cases in which it has found that an employer's attempt to require employee ratification of an offer of settlement acceptable to the union constitutes an attempt to repudiate the union as exclusive bargaining agent and hence is in breach of the Act. In *Wilson Automotive*, *supra*, the employer requested a section 34(e) vote (now section 40) on an offer which the union had already signed and returned to the company for execution. In response the union filed a section 14 (now 15) complaint alleging that by requesting a section 34(e) vote in the circumstances the employer had bargained in bad faith. In upholding the complaint the Board found that:

"By refusing to accept the union's execution of the collective agreement and insisting on a ratification vote among all of the employees, the respondent has in fact refused to recognize the union as the body with the exclusive authority to make a collective agreement

. . . The union's bargaining rights therefore continue in full force and effect. Whatever reservations the employer may have, it is not entitled to doubt or deny these rights at the bargaining table.

By not making a better offer and then insisting on a ratification vote of all employees, the employer would set the stage for a plebiscite calculated to undermine the union. The most plausible inference to be drawn from the employer's conduct is that it wants the vote on its offer among the employees to be a vote of non-confidence in the union so overwhelming as to effectively terminate the union's bargaining ability, if not its bargaining rights."

In *Selinger Wood Limited*, [1980] OLRB Rep. Nov. 1688, the Board found that the employer's refusal to execute a collective agreement which it believed had not been properly ratified violated section 14 of the Act. Finally, in *Fotomat Canada Limited*, *supra*, the employer, as part of a final offer, included a clause requiring employee

ratification of its offer. However, the trade union accepted the offer. The employer in turn took the position that "ratification is a necessary and required prerequisite to the proper execution of the collective agreement in question." The Board, in finding that the employer had breached the then sections 14, 46 and 58, stated:

"13. Part IV of the respondent's proposal is a clear attempt to reach around the exclusive bargaining agent and deal directly with bargaining unit employees. This is its obvious effect. Such conduct violates sections 14, 56 and 58 of *The Labour Relations Act*. As the United States Supreme Court held in *NLRB v. Borg-Warner Corp.* (1958), 356 U.S. 342, 42 LRRM 2034 at 2037 (per Barton J.), this type of proposal 'substantially modifies the collective bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with statutory representative.'

16. *We also find that the ratification proposal is not a proper subject of collective bargaining negotiations and the respondent's insistence on this aspect of its proposal contravened sections 56 and 14. Employees ratification is an internal trade union affair.* There is no statutory requirement that such procedures be adopted, although the good sense lying behind the concept of ratification has been commented on by this Board in the past and is well understood in the industrial relations community

18. Finally, we find that the respondent's purpose in proposing Part IV was to provide the bargaining unit employees with an opportunity to reject or accept *the complainant* trade union and not the proposed contract. It is simply non-sensical for an employer to request such a procedure when the bargaining agent has already expressed its intention to accept the contract. What is the more likely reason for insisting on employee ratification in such circumstances?

Is the employer genuinely concerned that the contract is not sufficiently attractive or 'rich' to be acceptable to the employees?"
...

(emphasis added)

15. Reference can also usefully be made to *K-Mart Distribution Centre*, [1981] OLRB Rep. Oct. 1421 as a case in which the Board dismissed a complaint by a group of employees that the union had breached the duty of fair representation section of the Act by entering into a collective agreement which had been rejected by a majority of the employees in the bargaining unit. The Board, in dismissing the complaint, found that section 72 of the Act, which regulates the voting constituency and the voting procedure in connection with a ratification vote, does not bind the trade union to any

particular course of conduct in light of the results. The Board concluded in that case that:

“35. We do not think that the union was required to resume futile bargaining, engage in an unpopular and abortive strike, or walk away from its bargaining rights, for, to hold that it was required to adopt any of these options would be to say either that it must participate in a pointless charade, and engage in an exercise in self-destruction, or that the repudiation of the employer’s offer should be construed (as Mr. Bhatia did) as an effective termination of its bargaining rights. We are not prepared to make such a finding.” . . .

16. We can come to no other conclusion in this case but that the employer, by insisting on the inclusion of article 3.03 in its proposed collective agreement, was attempting to side step the trade union as the certified bargaining agent and deal directly with its employees. Accordingly, for the same reasons articulated in *Fotomat*, *supra*, we also find that the ratification proposal advanced by the employer in this case is not a proper subject of collective bargaining negotiations and the respondent’s insistence on this aspect of its proposal contravenes sections 64 and 15 of the Act.

17. We are also compelled to conclude that the company’s refusal to execute a collective agreement on the basis of the terms of settlement proposed by it (with the single exception of article 3.03 which we have found to have been an unlawful demand) constitutes an unlawful attempt to repudiate the union as the lawfully certified bargaining agent of its employees and to deal directly with these employees. The refusal of the employer to execute a collective agreement on the basis of the terms of settlement proposed by it constitutes a breach of sections 15 and 64 of the Act.

18. The Board has been asked to direct the employer to enter into a collective agreement. The Board has consistently recognized that the principle of voluntarism underpins the collective bargaining process established under the Act and has, therefore refused to direct the execution of a collective agreement where there is not a complete understanding between the parties. In the absence of a complete understanding, the Board would be required to impose terms if it was to direct that a collective agreement be executed and this it has refused to do. (See *Lake Ontario Steel Company Limited*, [1979] OLRB Rep. July 671, *The Journal Publishing Company of Ottawa Limited*, [1977] OLRB Rep. June 309, *Graphic Centre (Ont.) Inc.*, [1976] OLRB Rep. May 221. However, where the evidence establishes that all outstanding issues between the parties have been resolved, the Board has not hesitated to direct the execution of a collective agreement in the exercise of its remedial authority. (See *Coulter Copper & Brass Limited*, [1981] OLRB Rep. May 519, *Fotomat Canada Limited*, *supra*, *Wilson Automotive*, *supra*, *Selinger Wood*, *supra* and *Municipality of Casimir, Jennings and Appleby*, *supra*.)

19. In this case, all outstanding matters between the parties have been resolved. The draft collective agreement signed by the union and forwarded to the company for signature is the draft collective agreement proposed by the company exclusive of the

unlawful ratification clause. In these circumstances, we have no hesitation in directing the respondent to execute the agreement. The respondent company is hereby directed to sign the draft agreement which was presented to it for signature on September 7, 1982. The complainant union advised the company of the union's decision to execute a collective agreement on the terms contained in the company's last offer on September 7, 1982. The employer replied by letter dated September 13, 1982 that it was not prepared to sign the agreement. We are satisfied that if it was not for the respondent's unlawful refusal to execute the collective agreement, it would have been executed on or about September 13, 1982 and accordingly, we hereby direct that the agreement be made effective from that date and that the terms and conditions contained therein be applied to the employees in the bargaining unit forthwith.

20. In the further exercise of our remedial authority we direct that the respondent post copies of the attached notice marked "Appendix", after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material.

21. We will remain seized of this matter in the event of any difficulty with the implementation of our order.

DECISION OF BOARD MEMBER J.A. RONSON;

I concur in this decision but wish to make certain observations which will be set out in a concurring decision to follow.

Appendix
The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE, THE UNION AND THE EMPLOYEES WHO HAVE FILED AN APPLICATION TO TERMINATE THE UNION'S BARGAINING RIGHTS PARTICIPATED, THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY TABLING AN UNLAWFUL CONTRACT PROPOSAL AND BY REFUSING TO EXECUTE A COLLECTIVE AGREEMENT WITH THE UNION.

WE ASSURE ALL OF OUR EMPLOYEES THAT:

- (1) WE RECOGNIZE THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AS THE LAWFULLY CERTIFIED BARGAINING AGENT OF ALL OF THE EMPLOYEES IN THE BARGAINING UNIT;
- (2) WE WILL DEAL WITH THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AS THE LAWFULLY CERTIFIED BARGAINING AGENT OF ALL OF THE EMPLOYEES IN THE BARGAINING UNIT.

WE WILL NOT INTERFERE WITH THE RIGHTS OF OUR EMPLOYEES UNDER THE ACT TO:

ORGANIZE THEMSELVES;

FORM, JOIN AND PARTICIPATE IN THE
LAWFUL ACTIVITIES OF A TRADE UNION;

ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

TRECO MACHINE & TOOL LIMITED

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 7TH day of DECEMBER, 1982

2620-81-U Kevin Ward on behalf of himself and Darcy Foran, George Freund, Leonard Paris, Chandar B. Singh, Gordon Reid, Randy Russell, Robert Gregory, Steve Gordon, Terrence Eastman, and Eric Ondrade, Complainants, v. International Union of United Plant Guard Workers of America, Amalgamated Local 1962, Respondent, v. **Governing Council of the University of Toronto**, Intervener

Duty of Fair Representation – Unfair Labour Practice – Whether bargaining committee intentionally misrepresenting terms of settlement – Whether committee members' conduct perverse and arbitrary – Error of judgement not breach of fair representation duty

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members M. J. Fenwick and W. H. Wightman.

APPEARANCES: *Michael G. Horan and Kevin Ward for the complainants; Chris G. Paliare, Watson Cook and A. Ross for the respondent; R. A. Werry and J. Parker for the intervener.*

DECISION OF THE BOARD;

1. This is a complaint alleging a violation of section 68 of the *Labour Relations Act*. That section reads as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The Board notes that the parties were content that this panel of the Board should hear this matter notwithstanding the Vice-Chairman's connection with the intervener – a matter which was raised at the outset of the hearing.

2. The complainants are security guards in the employ of the University of Toronto. The respondent is their bargaining agent. Local 1962 is a "Composite local" comprising some twenty-two bargaining units, with a total membership of about seven hundred. The University of Toronto unit is one of them, and has approximately 57 members.

3. The complaint is based upon the alleged misconduct of the union bargaining committee during the most recent round of negotiations with the University. The bargaining committee for those negotiations consisted of Watson Cook, the president of Local 1962, Glen Goodwin, then the chief steward for the University of Toronto unit, Harold Rossborough, the steward from the St. George Campus, James McGhee, the steward from the Scarborough Campus, and Bodo Senkpiel, the steward from the Erindale Campus. Albert Ross, another union representative, also had a hand in the bargaining although the evidence of his role is not entirely clear.

4. All of the stewards are rank and file employees elected to their positions by their fellow employees in the bargaining unit. Watson Cook, is elected by the local union as a whole. Mr. Cook, is an employee of the Ford Motor Company. He devotes approximately one hundred days a year to union business. For this efforts, he is reimbursed for the wages he would otherwise lose. In addition, he receives an honourarium of one hundred dollars per annum, plus the sum of two hundred dollars per month to defray the cost of maintaining an office in his home from which the affairs of Local 1962 are conducted. Mr. Cook has been president of the local for many years.

5. The most recent set of negotiations began in the fall of 1980, after the union's request to trigger a "wage re-opener" in the then subsisting collective agreement. The University responded that a more generous wage offer could be made if the union would consider a broader range of proposals designed to improve the quality and training of the University of Toronto "Police Force". This suggestion was acceptable, and discussions proceeded on that basis. If a new package could be negotiated, the parties were agreed that they would apply to the Ontario Labour Relations Board for the early termination of the existing collective agreement, for which the new agreement would then be substituted. Such consent was eventually sought and granted by a decision of the Board dated March 23, 1981.

6. Negotiations proceeded through the fall and winter of 1980-81 in respect of a number of matters, major and minor, with which one party or the other was concerned. The Principle focus of the discussions, however, was the University's proposal to introduce a new classification system involving two classes of constable, new arrangements for probationary employees, a training programme, and a new wage progression. Many other items and conditions of employment were dealt with as well, but the new classification system and related proposals represented the most significant departure from the status quo. On the other hand, in exchange for the union's agreement on those matters, the employer was prepared to offer wage increases of approximately thirty-five per cent over two years - more than other unions at the University of Toronto had received, but justifiable in terms of the University's quality and productivity objectives.

7. By April 29, 1981 (on which date the parties had been bargaining for eighteen hours), the negotiators finally reached an agreement which they were prepared to recommend to their respective principals. On that basis, the union bargaining team scheduled a ratification meeting for the following morning, and the chief negotiator for the University sought authorization in respect of the various issues which had been resolved that night. Such authorization was given, and the following morning, after some further discussion, all items were finalized and "signed off". A number of issues which had not been resolved completely were slated for continuing consideration by a joint union-management committee.

8. It may be appropriate at this point to identify the two items which were the main cause for later employee concern - although this employee reaction was not anticipated by the bargaining committee at the time. Had the bargaining committee anticipated the resulting uproar, they might have acted differently and this proceeding could have been avoided. It could also have been avoided if the complainants had been less ready to impute an improper motive when, in fact, there was none.

9. The old collective agreement gave the University the right to hire, terminate, reclassify, promote, or demote employees, and generally to maintain order, discipline and efficiency in the University of Toronto "Police Force". It provided for a generous sick leave plan and specified that misuse of sick leave would be a cause for termination. Following a prolonged illness the University could require an employee to be certified as medically fit by its own doctors prior to his return to work. But it did not otherwise *expressly* deal with the subject of medical examinations (although, arguably, fitness is an implicit requirement of the job). Not so the new agreement. The new agreement provided that the fitness of new employees would have to be certified by a doctor employed by the University. Likewise, all employees would be required to submit to an annual examination to ensure that they remained fit. Where the University had reason to believe that an employee could not satisfactorily perform his duties, it could require him to be examined by a University doctor. These requirements may seem unexceptional for a group of employees who perform quasi-police functions, and who sought to be compensated accordingly, but they represented a change in the context of the University of Toronto and its previous dealings with its security forces.

10. The bargaining committee was not entirely sanguine about this particular proposal, nor was it completely unaware of the employee anxiety which the medical examinations might generate. Glen Goodwin, the chief steward, had formerly been a member of the R.C.M.P. and had been unable to remain because of medical considerations. He was concerned that the University was requiring its employees to meet the standards of an active municipal or federal police force even though their duties were quite different. Harold Rossborough was also concerned. However, the University assured the bargaining committee that the medical examinations were not a device to get rid of existing employees. Rather, they were a means to detect physical conditions which would make employees incapable of carrying out their regular duties, or could render them a danger to themselves or their fellow employees. In the University's submission, the age range of its employee complement justified its concern; and, in any event, there was nothing particularly unusual or unreasonable about an employer requirement that its employees be fit to carry out their assigned duties. With this assurance, the bargaining committee was prepared to accede to this part of the employer's package proposal.

11. None of this had a direct effect on Watson Cook of course. He was not an employee of the University, and given the acquiescence of the other members of the bargaining committee there was no reason for him to accord any great significance to this particular concession. He did not foresee that it would later become, as he put it, "a hot potato".

12. The other matter about which there would later be considerable debate, was the issue of "lieu days" – that is, a day off in lieu of a statutory or other designated holiday which might fall on a day when the employee was not scheduled to work. The University's practice was to grant lieu days in respect of some holidays, and in some circumstances, but it was not generalized or equally applicable to all campuses. At the satellite campuses of Scarborough and Erindale, the University usually gave employees the option of lieu time off or equivalent wages. But at the main campus where the bulk of the employees worked, scheduling constraints made it difficult to grant extra time off. There, employees were only given an extra day's pay. The bargaining committee

urged the University to extend its practice at Erindale and Scarborough to the main campus, and believed that the University had agreed to this proposal. However, the University later took the position that it had agreed only to *endeavour* to do so, that the scheduling difficulties on the main campus were temporarily exacerbated by unfilled vacancies, and that the matter should be one for continuing discussion at the union-management meetings. Thus, as sometimes happens in collective bargaining, there was a disagreement between the parties as to what had actually been agreed upon.

13. The final memorandum of settlement was compiled on April 29–30 and included numerous items settled in negotiations over the previous months. It does not contain any modification of the employer's obligations respecting lieu time. Accordingly, the written document reflects the University's understanding of the resolution of that issue.

14. The ratification meeting convened at the Sutton Place Hotel on April 30, 1981 at about 10:30 a.m. Almost all of the employees in the bargaining unit were in attendance. Having only finalized the settlement that morning, the bargaining committee had not had an opportunity to prepare a summary of amendments for circulation to the members present, but they had prepared a series of charts to explain the new classification system and the pattern of wage progressions associated with it. These were the most complicated and important changes to the agreement, and much of the discussion revolved around them.

15. Watson Cook thought that the package was one of the best that he had ever negotiated, and said so. When some of the employees expressed concern that they would not be promoted from second-class to first-class constable, as indicated in the flow chart, Cook repeated the assurance that he had received from the University. He had been told that, except in highly exceptional circumstances, it was expected that all employees would attain the higher classification after completing the prescribed training programme. As Cook put it "you would have to almost commit murder not to make first class.". As it turned out, fifty-six of the fifty-seven employees did indeed move to the higher classification and wage level. This employee fear turned out to be unwarranted.

16. As the Board has already noted, the bargaining committee did not circulate a summary of the proposed changes. Instead, Watson Cook went over them orally from a checklist he had prepared, fielding questions, or giving further explanation, as necessary, in response to questions from the floor. Cook told the Board that in this respect, he was following his usual practice. Most of the bargaining units comprising Local 1962 are very small, and consequently, in Cook's experience, there has never been any difficulty in explaining new proposals. The University of Toronto bargaining unit, of course, is much larger than average.

17. Cook shared the platform with other members of the bargaining committee. When he had finished his own presentation, each shop steward had the opportunity to express his own views. Further, since each of the members of the bargaining committee had his own copy of the memorandum of settlement, a few copies were available if any of the other employees had wished to see them. Some of the employees may have done so during the coffee break. The evidence in this regard is not clear. Certainly the

members of the bargaining committee were prepared to allow their fellow employees to peruse the details of the package. There was no effort to conceal what the package contained nor any reason why anyone would want to do so.

18. In his remarks, Cook sought to summarize the changes in the agreement so that the employees would understand the package which they were being asked to vote for. His presentation included his understanding of the lieu day issue (a misunderstanding as it turned out), as well as many other items included in the memorandum of settlement. It is not disputed that his explanation was substantially accurate and complete. What is disputed, is whether he mentioned the change in the University's practice respecting medical examinations, and whether if he failed to do so, he was intentionally trying to mislead the employees.

19. Kevin Ward testified that he was sure that the medical item had not been mentioned. While he could not recall all of the discussion (which, after all, had occurred some sixteen months previously), he told the Board that he was sure he would have remembered the medical matter even though it was not of particular concern to him. Ward admits, however, that other employees had told him that their recollection is different, and the medical issue had been raised. Darcey Foran also testified that the medical issue had not been mentioned, although he admitted that he had not paid close attention to much of the discussion because many of the issues were of no direct concern to him. "Ralph" Rambarron, who was not a member of the bargaining committee and has no union office, was equally sure that the question of medical examinations *had* been raised. For reasons which need not be elaborated here, we are not prepared to give any weight to the evidence concerning his recollections. Bodo Senkpiel was a member of the bargaining committee whom we find to be a credible (if sometimes confused) witness. He told the Board that he recalled a reference to the medical examination item because he remembers turning to the page in the memorandum of settlement where that item is to be found. In his case, however, it is clear that he did not recognize or regard the change as significant. Harold Rossborough, no longer works for the University. He testified that he cannot now recall whether the item was mentioned or not; but he thought that if it had not been mentioned, as a member of the bargaining committee, he would have adverted to it in his own comments. Watson Cook also testified that he could not recall whether or not he had mentioned this matter. He intended to raise it along with the other proposed changes to the agreement, but he concedes that he may have omitted to do so by oversight or because he was diverted from his planned agenda by questions from the floor. And apart from the snide suggestion that their elected representatives were "in bed with management", there is no satisfactory explanation advanced by the complainants as to why the members of the negotiating committee should want to deceive their fellow employees.

20. The meeting of April 30th concluded with a secret ballot vote wherein, with only two dissenters, the employees overwhelmingly endorsed the proposed settlement. Some weeks later, before the new agreement had been printed and circulated, rumours began to circulate about the requirement to take a medical examination and the employer's intentions in this regard. The exact origins of this rumour are unclear, but certain comments (attributed to the new police chief) that the medical examination would be a device to "get rid of the dead wood" did little to reduce the employees

apprehensions. Kevin Ward called Watson Cook to voice his concern, and on June 8, 1981 he called an emergency meeting of employees to discuss the matter. The meeting was attended by approximately seventeen bargaining unit employees. They demanded that Cook provide a written summary of the contract changes (which he subsequently did) and purported to prohibit any meeting with the employer for any purpose until the employees' concerns were resolved, and, in particular, for a period of six to eight weeks until elections could be held to select a new slate of shop stewards.

21. Cook was not unsympathetic to these employee concerns. But he did not consider himself bound to accede to what appeared to be a minority view. He had negotiated a collective agreement in good faith. That agreement had highly beneficial economic provisions compared to those negotiated by other unions at the University and it had been duly ratified by the overwhelming majority of the employees in the bargaining unit. Cook did not think that the agreement should be lightly disregarded, nor did he feel free to do so in the circumstances.

22. Cook's perspective was much different from that of the employees who attended the June 8th meeting. He had attended the bargaining sessions, while they had not. He had heard the employer's assurances, they had not. And neither he nor the other members of the bargaining committee had any reason to question the integrity of the physician who would carry out the medical examinations. On the contrary, in Cook's view, the University was and remained a "good employer" in relative terms, with which he had had amicable dealings over the years. He had no reason to doubt the University's assurances, or to suspect it of duplicity. When, several years ago, a large number of employees in the bargaining unit had been accused of theft, and the University had considered contracting out the security services altogether, Cook had managed to persuade the employer not to do so. In Cook's view, the University had always been reasonable in the past, and despite the inappropriate and inaccurate comments attributed to the Police Chief, Cook expected the University to continue to take a reasonable approach to the resolution of employee problems. Cook had no reason to question the University's credibility, nor was there any political capital to be made in casting the employer in the role of the villain. Cook was confident that any problems respecting the settlement could be resolved through further discussions, and he told the employees so.

23. Cook subsequently met with J. H. Parker, manager of labour relations for the University. Parker was the University's spokesman at the bargaining table. Cook had been dealing with him for many years. Parker took the position that assured fitness was part of the bargain. That bargain was a package of interrelated proposals which the employees had subsequently accepted, and Parker was not prepared to reopen negotiations. However, Parker agreed that should any dispute arise concerning the application of the new clause regarding medical examinations, the employee could be examined by an independent medical consultant whose decision on the employee's fitness would be final. This appeared to be a reasonable compromise which it was expected would allay employee concerns about the University's good faith. This agreement was contained in a "letter of intent" dated June 19, 1981 which was appended to the collective agreement. The collective agreement itself was executed on the same day. The lieu day issue remained unresolved.

24. On June 22, 1981, Mr. Ward and others conducted a further meeting of employees where the same issues were discussed once again. By this time there was considerable bad feeling between Ward and his supporters, and the members of the bargaining committee who believed that they had been unjustly attacked. Rossborough regarded Ward an opportunist who was quick to criticize and intolerant of any views other than his own. Rossborough and Goodwin resented the attack on their own integrity. In the circumstances, the Board does not attach much significance to the fact that the members of the bargaining committee were cool to their accusers. The debate had also assumed "political" overtones. In August, 1981, the employees elected a new slate of shop stewards replacing those who had earlier formed the bargaining committee. Ward replaced Goodwin as chief steward.

25. Following the execution of the collective agreement the monetary and other terms were implemented. In February, 1982, the University decided to initiate the medical examinations referred to in the agreement, and called a meeting of employees attended by the University's director of medical services, in order to help dispel any residual employee misgivings. In this regard it was not successful. However, despite the employees' apprehensions, the allegations of misconduct levelled against their representatives, and the August elections, *all* of the employees did, in fact, pass their medical examinations. No one's job was actually put in jeopardy – just as no one was actually prejudiced by the new classification system. The employees may well have feared for their future, but in the short run, at least, these fears turned out to be entirely without foundation.

26. It is alleged by the complainants that Cook and the bargaining committee intentionally misled the other employees about the medical examination issue, and that they knowingly conspired in this purpose. In support of this contention, Kevin Ward referred to a conversation which he had with Harold Rossborough where the latter is alleged to have said that the members of the bargaining committee "took a vote" on whether the medical issue would be raised with the membership. Rossborough is alleged to have said that he was the only dissenter, and that all of the members of the bargaining committee had been sworn to secrecy about this matter.

27. This conversation, if true, would go a long way to establish a breach of section 68. But that is not what Rossborough said at all. Rossborough did indicate that he was initially reluctant to agree to the University's proposals. However, he was eventually satisfied with the employer's explanation, and because this item was part of a package which included substantial wage increases, Rossborough was prepared to go along with the bargaining committee's consensus. Rossborough also said that, at the request of the University, the members of the bargaining committee agreed not to communicate the terms of the package until it had been finalized. This kind of "blackout" arrangement is quite common in the collective bargaining process. There was no conspiracy of silence or attempt to deceive the employees in the bargaining unit. Ward simply did not, or chose not to, understand what Rossborough was saying.

28. This conversation was later raised in support of the allegations against Cook and the other members of the bargaining committee. It does not support those allegations. What it does illustrate (to put the matter in its best light) is how attitude

can distort perception and lead to misunderstanding. Suspecting wrongdoing, Ward chose to interpret Rossborough's perfectly innocent comments as proof of it. It is one of the ironies of this case that the allegations against Cook and the bargaining committee also involve elements of failed communication and misunderstanding. The union argues that Ward's evidence respecting the Rossborough conversation reflects, at best, on his judgement, and, at worst, on his motives.

29. It is asserted that Watson Cook and the members of the bargaining committee intentionally and illegally misrepresented the settlement terms. On the evidence before us we find that there is no basis for this allegation. We are satisfied that, throughout, Mr. Cook and the members of the bargaining committee were acting in good faith in what they honestly believed to be the best interests of their fellow employees. They had no ulterior motive or secret agenda. They thought that the settlement was generally a "good deal" (which, objectively, it is). If they failed to mention an item which afterwards, and in retrospect, achieved a political and emotional dimension not previously foreseen, it was as a result of honest inadvertance, not intentional misconduct. Likewise, if they failed to adequately "pin down" the lieu day issue, it was an honest mistake in respect of a matter which had never been a prominent or serious item in the bargaining process.

30. It is said, in the alternative, that the conduct of Cook and the bargaining committee is so perverse and arbitrary as to make it illegal under section 68 of the *Labour Relations Act*. Again, we do not agree. The union representatives would have been wiser if they had waited a few days before scheduling a ratification meeting. They would have been wiser if in addition to preparing charts illustrating what they considered to be the most important items, they had also prepared a summary of the negotiated changes or circulated the memorandum of agreement itself. They would also have been wiser if they had attempted to formalize the understanding on the lieu day issue, since this attempt might have crystallized the disagreement which later arose between the parties concerning its application on the main campus. But it is one thing to look at a pattern of conduct and identify what would have been the wiser course. It is another to say that the pattern of conduct is illegal and in breach of a public statute. We do not think the conduct of Mr. Cook and the members of the bargaining committee rises to this level.

31. By enacting section 68, the Legislature sought to temper the union's authority and prevent abuses which might otherwise arise if that authority were completely unreviewable. But there is a world of difference between bad faith, malice, discrimination, or subjective ill will which are all clearly proscribed, and miscalculations, honest mistakes, or errors in judgement which after the fact may become the focus of criticism by some members of the bargaining unit. Union affairs are usually conducted by laymen who may be elected for qualities other than their legal training. Elected officials will sometimes make mistakes. However, we do not think that the Legislature intended that every miscalculation, honest mistake, or error in judgement, would constitute a breach of the law. Section 68 was never intended to provide a remedy for all of the failings (real or imagined) of union officials. It must be remembered that union representatives will generally face the discipline of the ballot box, (as some of those here did) and if employees are dissatisfied with the quality of representation they

are receiving they can always change their bargaining agent. This is a sufficient check without the Board converting honest errors into "arbitrary" and illegal conduct – particularly where, as here, the employee concerns turned out to be largely unfounded.

32. In our view, the evidence does not support the allegation that the respondent has acted in bad faith. Although the conduct of Cook and the bargaining committee may, in some respects, have been in error or unwise, we do not think it can be characterized as "arbitrary" within the meaning of section 68 of the *Labour Relations Act*. The complaint is therefore dismissed.

0109-82-R United Steelworkers of America, Applicant, v. U S L Industries Inc., Respondent,

Reconsideration – Sale of a Business – Third party acquiring assets of business – Reselling assets to respondent – Board decision finding no sale of business – Application for reconsideration dismissed

BEFORE: E. N. Davis, Vice-Chairman, and Board Members John Murray and W. F. Rutherford.

DECISION OF E. N. DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER J. W. MURRAY; December 22, 1982

1. The Board, by a majority decision dated July 9th, 1982, dismissed the applicant's request for a declaration pursuant to section 63 of the *Labour Relations Act*. (See [1982] OLRB Rep. July 1080) Counsel for the applicant has filed an application for reconsideration of that decision, and in support thereof has made comprehensive submissions as to why the Board ought to, in the circumstances of this case, reconsider its original decision.

2. The majority of the Board found that there was not a sale of a business from the predecessor employer Universal to the alleged successor employer U S L Industries Inc. The Board in arriving at that decision, carefully reviewed the evidence that was tendered before it and the submissions of counsel made at the hearing of this matter.

3. In the request for reconsideration, counsel writes:

"It is respectfully submitted that the majority erred by reading into section 63 of the Act the requirement that, in order to find a "sale", the machinery, equipment, or other fixed assets of Universal had to be acquired and operated by Danbury Sales as a going concern. The fixed assets of Universal did not constitute its undertaking, nor did Danbury Sales use them for some purpose other than resale to U S L. *Danbury merely held legal title to assets while Maurice Fagan took steps to acquire them, under a new corporate vehicle,*

for the express purpose of continuing the business of the Markham plant.”

[Emphasis added].

4. Counsel seeking reconsideration, (who was not counsel at the original hearing in this matter) asserts that U S L Industries Inc. engineered the transaction through the use of Danbury Sales Ltd. to acquire the business of Universal, without the union's bargaining rights or collective agreement. However, the evidence before the Board in this case simply did not disclose these facts, nor could the majority of the Board draw that inference from the facts established by the evidence. Furthermore, counsel for the applicant at the hearing, when given the opportunity by the Board to request further evidence from the respondent as to its role in the acquisition of the assets of Universal by Danbury chose not to do so. As the majority noted in paragraph 14 of its original decision:

“Danbury was not before the Board in this matter and we have no direct evidence as to the nature and scope of the transaction between Danbury and Richter and Partners Inc. as Receiver and Manager of Universal.”

5. The evidence before the Board indicated that Richter and Partners Inc., the Receiver and Manager of the business of Universal, attempted to sell the business as a going concern but was unsuccessful. Thereupon it sold the assets of Universal by tender to Danbury Sales Ltd. There was no evidence before the Board upon which it could reasonably find that Danbury was acquiring those assets on behalf of U S L Industries Inc. or with the prior intention of selling them to U S L. Danbury Sales Ltd. did not purchase the business of Universal nor did it operate the business as a going concern. Furthermore, the only evidence before the Board of the relationship between U S L Industries Inc. and Danbury Sales Ltd. was given by Mr. Fagan who testified, as set out in paragraph 6 of the Board's decision:

“There was no connection of any kind between Danbury Sales and U S L.”

That statement was not contradicted by any evidence received by the Board.

6. The balance of the submissions by counsel for the applicant argue that the Board erred by failing to attach sufficient weight to the role of Maurice Fagan, “the key man” in the Universal operation who is also “the key man” in U S L Industries Inc. and further that the Board failed to have regard to the entire series of transactions as a whole to find that there had been a transfer or sale of the business from Universal to U S L Industries Inc.

7. Counsel further submits that “Danbury acted as intermediary” and therefore in actuality, the business of Universal was transferred to or was acquired by U S L Industries Inc. The Board has considered the able submissions of counsel, but the majority cannot agree with them. While the role of Mr. Fagan in the transactions is significant, it is not determinative of the matter. Rather, the Board must have regard to

what has actually taken place, based upon the evidence it received at the hearing. The evidence, in our view, does not support a finding that Mr. Fagan, although interested in acquiring the assets from Danbury, engineered a scheme through Danbury and Richter and Partners to acquire the business of Universal free of the union's bargaining rights. In our view, Danbury acted at arm's length in its purchase of assets from Universal, and further, acted at arm's length in the sale of those assets to U S L Industries Inc. There was not, in our opinion, a transfer of the business of Universal to either Danbury, or U S L Industries Inc.

8. While the Board has stated, as counsel for the applicant noted "that the interposition of a third party does not preclude a finding of a sale", a third party's acquisition of assets, and a subsequent sale of those assets does not necessarily give rise to a finding of a sale of a business. The majority of the Board was satisfied that, in this case, the evidence before the Board did not cause the Board to find nor to draw the inference that Danbury Sales was anything other than bona fide a purchaser of the assets of Universal who was seeking to sell those assets to any purchaser. The Board was satisfied on the evidence before that it could not sustain a finding that Danbury Sales acquired the assets of Universal for the purpose of reselling those assets to U S L Industries Inc. to permit it to continue Universal's business under a different corporate vehicle. Had that been the case, the Board's decision may well have been different.

9. It is our view that the request for reconsideration does not rely on additional evidence which could not have been reasonably available at the time of the hearing, nor does the applicant introduce arguments substantively different from those advanced at the hearing. For this reason the applicant's request for reconsideration is dismissed.

10. Board Member W. F. Rutherford, who dissented from the majority decision of July 9th, 1982, wishes to record his dissent from the instant decision.

2302-81-R Commercial Workers Union, Local 486, Applicant, v. Steinberg Inc., and **Yesteryear Grocers Inc.**, Respondents, v. Group of Employees, Objectors

Practice and Procedure – Sale of a Business – Panel ruling preliminary issues not seized with application – Whether union agreed to amend unit and carve out stores affected – Whether voluntary recognition of union by successor employer depriving Board of jurisdiction – Whether promissory estoppel applying against union – Change from supermarket to warehouse concept not substantial change to trigger s. 63(5) – Board not having discretion to relieve from impact of seniority provisions of agreement

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. Wilson and B. L. Armstrong.

APPEARANCES: *Alick Ryder, Q.C., Barry Baily and Guy Seguin for the applicant; R. Budd for Steinberg Inc.; C. M. McKeown, Q.C., for Yesteryear Grocers Inc.; James Fyshe, Doug Rombo, Mitch Plummer and Claire Patoine for the objectors.*

DECISION OF THE BOARD; December 15, 1982

1. This application made under section 63 of the *Labour Relations Act* with section 1(4) pleaded in the alternative, came on for hearing before the Board differently constituted on June 23rd, 1982. That hearing was adjourned and the application was scheduled for a continuation of hearing on July 8th before the panel as constituted herein. As indicated in the interim decision of the Board with respect to the June 23rd hearing, the Board dealt with and decided certain preliminary procedural issues. When the application came back on for hearing on July 8th before the Board as constituted herein, counsel for the respondents objected to the Board proceeding with the application on the grounds that the Board as constituted at the June 23rd hearing was seized with the application. They contended that the June 23rd Board had made a ruling with respect to the objectors' status, had heard extensive submissions on the procedural challenge to the Board's jurisdiction to entertain this application, after which it made a careful, reasoned ruling and having done so was seized with the application. The Board rule that, since the Board as constituted on June 23rd had not heard any evidence, there was no bar to this Board hearing the application. It would abide by the prior Board's ruling to hear the evidence and representations of the parties with respect both to the respondents' challenge to the Board's jurisdiction to hear the application and with the merits of the application, deciding the procedural issue first in order to determine whether it is necessary to deal with the application on its merits.

2. The applicant alleges that there has been a sale of a business within the meaning of section 63 of the Act from Steinberg to Yesteryear as a result of which Yesteryear is the successor employer pursuant to section 63(2). The applicant alleges in the alternative that Steinberg Inc. ("Steinberg") and Yesteryear Grocers Inc. ("Yesteryear") are carrying on related activities or businesses under common direction or control and, therefore, the Board should treat them as constituting one employer for the purposes of this Act. The applicant seeks a declaration from the Board that Yesteryear, on either ground, is bound to a collective agreement between Steinberg and the

applicant which purports to be effective from October 1, 1980 to September 30, 1982 ("The Agreement"). Hearings into the application by the Board as constituted herein were held on July 8th, 13th (in Toronto), September 9th, 10th (in Ottawa), and October 13th (in Toronto).

3. The application was filed with the Board on February 5th, 1982 and the Board's customary notice of the application and hearing date was sent to the two respondents and the applicant on February 8th. That notice set a terminal date of February 17th and gave notice that a hearing would be held into the application on March 1st. That hearing was adjourned on February 25th on the agreement of the solicitors for the applicant and the respondents and with the consent of the Board, with a new date to be set by the Registrar in April. On March 10th the hearing was rescheduled for April 15th. The Board was later advised by a letter dated April 1st from Mr. Barry Baily, President of Commercial Workers Union, Local 486 ("Local 486") that he and the respondents had agreed to adjourn the April 15th hearing to a date to be set by the Board in consultation with the parties. On that agreement, the Board consented on April 7th to adjourn the hearing. On April 28th, the application was scheduled for hearing on June 23rd. The replies to the application filed by the solicitors for both respondents were received by the Board on June 21st and the application proceeded to hearing on June 23rd as noted above.

4. The Board's findings of fact set out below will show that the following sequence of events was taking place prior to and after the filing of the application. Baily met in Ottawa with Normand Duchemin, Vice-President Operations for Steinberg, on December 8th, 1981 at Duchemin's request. Duchemin advised Baily of Steinberg's plans to close two of its stores in Ottawa because they were losing money. He told Baily that Steinberg was prepared to replace the stores with stores which would operate under a new concept, but would need to have greater flexibility in their operation. Duchemin asked Baily whether he would be prepared to negotiate a separate collective agreement with Yesteryear which would give it greater flexibility than that available under the Agreement with respect to wages, benefits and contract language. Following the December 8th meeting, Yesteryear and Local 486 met on January 4th, 1982, March 9th, March 31st and May 5th and attempted to conclude a collective agreement. They were unsuccessful and after the May 5th meeting no further meetings were held. Baily and another officer of Local 486, Jean-Guy Seguin, Vice-President and business agent of the Local met with Steinberg's zone manager for Ottawa and another Steinberg store manager shortly before Christmas 1981 to be apprised of the details of how the employees of the two Steinberg stores would be dealt with upon closing. Baily and Seguin also participated together with Steinberg managers in meetings of the store employees one week before the stores closed on January 9th, 1982. At these meetings, the employees were told on what basis they either would be transferred to other Steinberg stores within the geographic scope of the bargaining unit or, in the case of some part-time employees, be laid off. At the time Baily knew that no Steinberg employees would be retained for the new operation and that Yesteryear would be hiring new employees for its operation of the stores.

5. The Board heard the testimony of seven witnesses during four days of hearings. The findings of fact set out below are made after taking into account such factors as the consistency of their evidence, their ability to recall the events about

which they were testifying, the firmness of their memory, their ability to resist the influence of self-interest to modify their recollections, their ability to express their recollections clearly and their demeanor.

6. Yesteryear was established to introduce a food marketing concept of warehouse stores. These stores operate in Ontario under the style of "Basic" and in the Province of Quebec under the style of "Jadis". It is not entirely clear from the evidence when the concept was introduced, but the first store in Quebec was established in Montreal in September 1981 and some time before December 1981 Yesteryear identified a total of nine stores in the two provinces, including the two stores in Ottawa with which this application is concerned, to be converted to this concept. For ease of reference those two stores will be referred to collectively as the Basic stores and when referred to individually they will be referred to as the Montreal Road stores and the Merivale Road stores. Until January 9th, 1981, these stores were operated by Steinberg and were covered by the Agreement between Steinberg and Local 486 referred to above. By means of this application, Local 486 is seeking to have the Agreement apply to the two Basic stores. The Agreement covers full time and part time employees and describes the scope of the bargaining unit in the following terms:

The Employer recognizes the Union as a sole bargaining agent for all employees including maintenance employees employed in its stores situated in the Ontario Counties of Renfrew, Frontenac, Lanark, Carleton, Leeds, Grenville, Dundas, Stormont, Russell, Prescott and Glengary, save and except Store Managers, personnel above the rank of Stores Manager and one (1) Department Manager in each store.

The Montreal Road and Merivale Road stores have been included in that bargaining unit for at least ten years.

7. When Duchemin met Baily in Ottawa on December 8th, and advised Bailey of Steinberg's plans to close the two stores, he told Baily that Steinberg would transfer all of the full-time employees to other stores in the bargaining unit and some of the part-time employees according to their seniority. He told Bailey also that Steinberg was prepared to introduce the new store concept if Baily was prepared to discuss more flexible arrangements with respect to wages, benefits and collective agreement language in a separate agreement with Yesteryear. Duchemin was satisfied with Bailey's response and he reported the results of the meeting to Mr. Morris Ledenheim, a Vice-President of Steinberg and Vice-President and General Manager of Yesteryear. A decision was made in mid-December to proceed with the conversion of the Ottawa stores to the Basic stores concept.

8. That decision resulted in Steinberg closing the two stores on January 9th and transferring all of the full-time employees, except two who did not wish to move, to other Steinberg store locations within the geographic scope of the bargaining unit in the Agreement. 31 of approximately 60 part-time employees were recalled to other Steinberg stores in the unit after first being laid off. At least another ten were hired by Yesteryear. Those employees were required to resign from Steinberg before they were hired by Yesteryear and there was no undertaking to treat them any differently than

other persons hired off the street. Baily had been advised of the Steinberg plan for dealing with their employees of the two stores on closing, but he had no part in the making of the decision. He did participate in its implementation to the extent indicated above in paragraph 4. Nor was he part of the decision that Steinberg employees from the two stores would not be transferred to or given preference in hiring by Yesteryear. Steinberg did not consider its employees to have any rights with respect to employment in the two Basic stores and Yesteryear did not want them for the Basic stores, preferring instead to hire and train new employees in the Basic store concept. Steinberg's disposition of the full-time employees exceeded the requirements of the agreement. When the full-time employees and those part-time employees who were transferred to other stores were all relocated, the proportion of full-time hours worked to part-time hours worked throughout the bargaining unit had changed from a 50/50 relationship to a 70/30 relationship.

9. The Steinberg leases for the two stores were assigned to Yesteryear and some assets, mostly refrigeration equipment and a few leasehold improvements, were transferred from Steinberg to Yesteryear under an agreement by which Yesteryear assumed a debt of \$285,535.10 repayable by issuing to Steinberg one common share of Yesteryear. Yesteryear refitted the stores for the Basic store operation, purchased inventory and stocked stores. It hired new employees and re-opened the stores for business on February 10th. Yesteryear also engaged Mr. Alain Bilodeau, a lawyer who practices labour law in the Province of Quebec to act as spokesman in its negotiations with Local 486.

10. Negotiations began on January 4th, 1982, a date agreed to at the December 8th meeting between Duchemin and Baily. Bilodeau presented a complete proposal including language, benefits and wages at that meeting. The discussion was of a general nature and only the recognition clause in the proposal was discussed in any detail. Duchemin had made it clear to Baily on December 8th that Yesteryear was prepared to recognize Local 486 for the two Basic stores and, while the wording of the recognition clause was not settled at the January 4th meeting they had agreed on wording which described an all employee unit with the same geographic scope as the Agreement. The evidence of Duchemin, Bilodeau and Baily is in conflict with respect to whether Baily made any reference to a successor rights/related employer issue under the Act at the January 4th meeting. Both Duchemin and Bilodeau state that their recollection of any question of successor rights was at one of two negotiating meetings in March.

11. The parties agreed to meet again on February 4th, but that meeting was cancelled at the request of Yesteryear. Following cancellation of the meeting, Baily instructed the union's solicitor to file this application. Other negotiating meetings were held on March 9th, March 31st and May 5, during which the parties attempted to arrive at a collective agreement. While substantial progress had been made by May 5th, the parties were unable to conclude a collective agreement. The most important wage and benefits issues had been left for the May 5th meeting and were the main unsettled items when that meeting ended. Bilodeau states that Baily also wanted to know what kind of protection Yesteryear would be prepared to consider for Steinberg employees should any other Steinberg stores be converted to Basic stores, whether they would be considered for those stores and what pay protection would apply to them. There were no further negotiating meetings after May 5th and no final written agreement document

was submitted to the union. By that date, the notice of hearing for the June 23rd hearing into this application had already been sent to the applicant and the two respondents.

12. No promise was sought of Baily at the December 8th meeting or any of the negotiating meetings to waive any rights under the Act and no promise was made by him to do so. He did not promise and was not asked to promise not to file a successor rights application under the Act and after filing this application he made no undertaking to withdraw it, although, as indicated, he did agree to adjournments of one or more of the hearings scheduled for the application during the course of his negotiations with Yesteryear. Bilodeau testified that his first knowledge of any claim that Local 486 had waived its right to bring or pursue this application was late in June shortly before the June 23rd hearing. He was not in attendance at that hearing and learned of the claimed waiver from the office of Yesteryear's solicitors.

13. Yesteryear is a wholly owned subsidiary of Steinberg and some of its directors are also directors of Steinberg. Its President is Melvin A. Dobrin who is also Chairman of the Board of Steinberg. Ledenheim is an officer of Steinberg and Vice-President and General Manager of Yesteryear. Jean-Claude Babin, Director of Operations for Yesteryear, and the store managers of the two Basic stores were transferred to Yesteryear from Steinberg without any loss in service. Part of Ledenheim's salary is charged back to Yesteryear. Yesteryear is also charged for the use of any Steinberg corporate service, and it uses its accounting and legal services. Although it is a wholly owned subsidiary of Steinberg, Yesteryear does enjoy substantial independence in its day to day business functions. It does all of its own buying and has its goods shipped to its stores by public carrier, not by Steinberg's trucks. It does its own advertising, has different colours for its corporate logo on stores. Yesteryear employees are paid by cheques of Yesteryear and are not paid through the Steinberg payroll.

14. There are differences between the type of retail food supermarket operated by Steinberg under the Agreement and the Basic stores. Basic stores sell groceries, dairy products, produce and meats, the same four major food divisions which exist in Steinberg stores, but do not have in-store bakeries or delicatessens as the Steinberg stores usually do. The Basic stores carry fewer varieties of each product, for example milk is only available in bags, not in bottles or cartons. Fewer brands of products are available and there is very little duplication of products. Prices are displayed on the shelves, not on the items, and grocery products are displayed on shelves in their original cartons. Less in-store services are available: meats are pre-cut, customers have to supply their own bags or pay extra for them and produce is not pre-packaged. The average inventory consists of approximately 1100 items compared with 2400 in a supermarket. Yesteryear claims that the customers' costs are 30% less than in a supermarket.

15. The respondents base their contention that the Board does not have jurisdiction to hear the application on the evidence with respect to the December 8th meeting between Duchemin and Baily, the actions taken by Steinberg and Yesteryear following that meeting and the subsequent negotiating meetings with Baily. They argue that Baily was advised of the new store concept at the December 8th meeting and was told "that the two stores were his"; in other words, Local 486 would be recognized as bargaining

agent for the employees in the two stores when the new operations began and that this undertaking was reinforced throughout the collective bargaining meetings which followed the December 8th meeting. Counsel contend also that this recognition was solidified by March 31st when the remaining issues with respect to the recognition clause which Yesteryear had proposed were settled. They assert that neither Steinberg nor Yesteryear were aware during December or January of the possibility that an application would be made under sections 1(4) and 63 of the Act. They contend, that Baily has recognised Yesteryear as a separate employer from Steinberg by engaging in negotiations for a separate collective agreement with Yesteryear for the two Basic stores, a position wholly inconsistent with the filing of this application which is a claim that Steinberg and Yesteryear are one employer. The totality of the evidence with respect to the December 8th meeting and the collective bargaining meetings, they argue, supports the fact that when bargaining began on January 4th, Local 486 was recognizing Yesteryear as a separate employer from Steinberg.

16. As a branch of the foregoing argument, counsel argued further that Baily had effectively agreed to a carve out the Ottawa stores from the bargaining unit described in the Agreement. That result, they contend, arises from the fact that prior to the January 4th negotiating meeting Baily knew, from his December 8th meeting with Duchemin and his subsequent meetings with other Steinberg managers, that Steinberg would be transferring all full time employees of the two stores to other stores and as many part time employees as could be accommodated; that the rest of the part time employees would be laid off; that the laid off employees would not be given preferential treatment with respect to being hired for the Basic stores and that Yesteryear would be hiring new employees to staff the stores, and yet did not challenge any of these actions. Thus by allowing Steinberg to proceed with the relocation of employees from the two stores, by allowing Yesteryear to subsequently staff the two Basic stores with new employees and by negotiating with Yesteryear towards a separate collective agreement, Baily has agreed to an amendment to the bargaining unit description in the agreement by excluding the two stores.

17. In summary, counsel for the respondents contend that Yesteryear and Local 486 have agreed that Local 486 is the bargaining agent for Yesteryear's employees in the two Basic stores and any other Basic stores which might be opened within the geographic scope of the bargaining unit description which the respondents say has been agreed to between them. Moreover, Baily, by his actions on behalf of Local 486, has agreed to have the two Ottawa stores carved out of the bargaining unit described in the agreement between Steinberg and Local 486.

18. Counsel for the objectors adopts these same arguments.

19. Sections 1(4) and 63 of the Act, the two sections under which the application was filed and under which the Board's jurisdiction to hear it has been challenged, provide as follows:

Section 1(4)

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or

through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

20. The evidence of Duchemin and of Bilodeau, the spokesman for Yesteryear in its negotiations with Local 486, establishes unequivocally that Baily did not promise on December 8th or during the collective bargaining meetings that he would not file applications under sections 1(4) and 63 of the Act, nor did he promise to forego any rights of Local 486 and its members under the Act. Baily filed this application February 5th, approximately one month after the first collective bargaining meeting and again the evidence of Duchemin and Bilodeau is unequivocal that he did not offer or promise to withdraw the application. The Board is also satisfied that he was not asked to withdraw it, although he was requested and did agree to adjournment of the hearings which had been scheduled prior to June 23rd.

21. Were there a voluntary recognition agreement in writing between Yesteryear and Local 486 as contemplated by sections 5(3) and 16(3) of the Act, and there is no assertion by any of the parties to these proceedings that there is, would that recognition agreement bar Local 486 from bringing this application under section 1(4) and the Board from entertaining it? The Board thinks not. The question of whether Steinberg and Yesteryear are carrying on associated or related activities or businesses under common control or direction is a question of fact which would not be altered by Yesteryear and Local 486 having entered into a voluntary recognition agreement. If the Board were to find on the facts that Steinberg and Yesteryear were carrying on related activities or businesses under common control or direction, there being no evidence of

Steinberg or Yesteryear attempting to eliminate, diminish or otherwise frustrate Local 486's bargaining rights with Steinberg, the existence of an unchallenged voluntary recognition agreement in all likelihood would cause the Board to exercise its discretion under section 1(4) not to declare Steinberg and Yesteryear as constituting one employer for purposes of this Act, but it would not refuse to hear this application. Therefore, even if the Board was satisfied that there was a de facto voluntary recognition, and it makes no conclusion either way, the Board is satisfied that it has jurisdiction to hear this application insofar as it pertains to section 1(4) of the Act.

22. With respect to section 63 of the Act, the questions for the Board are, again, questions primarily of fact as to whether Steinberg has sold, leased, transferred or made any other manner of disposition of a business or part thereof to Yesteryear and whether Steinberg is bound to a collective agreement with Local 486 for purposes of section 63(2). It is not a question of whether Local 486 has bargaining rights with Yesteryear, the purported successor employer in the alleged sale of the business. If a trade union other than Local 486 was claiming to have bargaining rights for the Yesteryear employees and there was a conflict between those rights and the rights of Local 486 as the trade union that represented the employees of Steinberg, the predecessor employer, the Board would have jurisdiction under subsection 4 to modify the bargaining unit in either collective agreement. Subsection 4 clearly contemplates also that a finding has already been made under either subsection 2 or subsection 3 of section 63. If, as it appears, bargaining rights held by a trade union other than Local 486 for employees of Yesteryear would not bar the Board from entertaining Local 486's application, it is difficult to see why it should be barred from entertaining the application because of the claim that Local 486 holds those bargaining rights. Therefore, even were the Board satisfied that there is a de facto voluntary recognition agreement between Yesteryear and Local 486, and the Board reiterates that it makes no conclusion either way, the Board would not be persuaded that it lacked jurisdiction to hear this application.

23. Nor does the Board agree with the arguments of counsel for the respondents and objectors that there has been a carving out or dissolution of Local 486's bargaining rights with respect to the two Basic stores so that the scope clause of the Agreement would no longer encompass the employees of the stores. Certainly this has not been achieved by any agreement in writing signed by the parties and, while section 52(5) which accommodates revision by mutual consent of provisions of a collective agreement other than provisions relating to its term of operation makes no reference to the need for such revisions to be in writing and signed by the parties, section 1(1)(e) of the Act which defines a collective agreement does so require. It would seem reasonable, therefore, that an amendment by mutual consent of the bargaining unit in the Agreement would be in writing and signed by the parties. In the absence of such an agreement, the Board is satisfied that there has been no carving out or dissolution of bargaining rights with respect to the two Basic stores. In the result, the Board finds that there is no bar to its jurisdiction to hear this application and, therefore, it finds that it has jurisdiction to hear and determine it on its merits.

24. Counsel for the respondents and the objectors argued in the alternative that, by the same evidence, Local 486 was estopped from bringing this application and that the Board should apply the doctrine of promissory estoppel to it. Counsel for the

objectors contended as well that the evidence supported application of the doctrine of estoppel by encouragement or acquiescence and also by waiver.

25. Counsel for the respondents relied on a variety of authorities from the proposition that Local 486 should not be allowed to enforce its strict legal rights by bringing this application when, by Baily's conduct, Steinberg and Yesteryear have been led to believe that Local 486 would not do so. They contend that Steinberg, as a result of Baily's undertaking at the December 8 meeting and his subsequent conduct, proceeded to close the two stores, transfer the employees of those stores under terms more generous and more expensive to Steinberg than called for by the collective agreement and to transfer the leases for the stores and certain assets to Yesteryear. Yesteryear proceeded to renovate the two stores, stock them with inventory, hire new employees to staff the stores and engage counsel to represent Yesteryear in collective bargaining with Local 486. Counsel referred to the Board to Brown and Beatty, *Canadian Labour Arbitration*, Agincourt, Ontario, Canada Law Book Limited 1977, topic 2:2210 at p. 67 with respect to the application of the doctrine generally by arbitrators, to seven decisions of this Board as authority for the Board's recognition of the doctrine and to *Canadian National Railway Co.*, (1982) 34 O.R. (2d) 385, a review by the Ontario Divisional Court of the award of an arbitrator, as authority for the Court's recognition that a claim could be based on a representation to one party made by the conduct of another party. Counsel for the objectors referred the Board also to the judgement of Denning, J., in *Central London Property Trust Limited v. High Trees House Limited*, [1947] K. B. 130, as authority for the principle of promissory estoppel. Counsel argued that as a result of Baily's conduct and in addition to the other actions taken by Steinberg and Yesteryear referred to by the respondents, Yesteryear entered into new contracts of employment with its newly hired employees and Baily stood by allowing Yesteryear to do this without attempting to enforce the rights of Local 486 and its members under the agreement. Therefore Local 486 should not now be able to seek to enforce those rights by bringing this application. In this respect, counsel referred the Board to the judgement of the Supreme Court of Canada in *Grassett v. Carter*, [1883] S.C.R. 105. For all of these reasons, counsel for the objectors argues that Baily should be estopped from going back on his agreement with Steinberg with respect to the carving out of the two stores from the bargaining unit of the Agreement and from the voluntary recognition agreement with Yesteryear.

26. Should the Board still proceed to decide the application on its merits, counsel for the respondents argue that the Board should dismiss the application with respect to section 1(4) because the requisite criteria are not present, in particular there is no functional inter-dependence and coherence between Steinberg and Yesteryear; Local 486 has not satisfied the burden of proof and, even if the Board finds that Steinberg and Yesteryear carry on related businesses or activities under common direction or control, the Board should exercise its discretion to refuse to declare them as constituting one employer for purposes of the Act. They submit that it makes no labour relations sense to say they are the same employer when Local 486, by bargaining with Yesteryear, has recognized it as a separate employer and because there would be greater prejudice to Yesteryear by granting a declaration than there would be to Local 486 by refusing to grant it. That greater prejudice would result from Yesteryear being forced into the Agreement if the Board allows the application, whereas, if the Board dismisses it, the security of Local 486 and its members has been protected by Steinberg's agreement to

not lay off full-time employees when it closed the two Ottawa stores and by Yesteryear's undertaking to recognize Local 486 as bargaining agent for the new employees of the two Basic stores.

27. With respect to the application as it pertains to section 63 of the Act, counsel for the respondents argue that the Board has the discretion to not declare the successor to be bound by the collective agreement of the predecessor even if it finds that a sale of a business has taken place. Therefore, if the Board finds a sale of the business between Steinberg and Yesteryear on the facts herein, because Yesteryear's recognition of Local 486 as bargaining agent for its employees goes beyond the two Basic stores to include the same geographic scope as the bargaining unit in the Agreement, the Board should confirm that recognition and preserve those bargaining rights, declare the Agreement not to be binding on Yesteryear and order the parties to return to the bargaining table with access to conciliation services.

28. Counsel for the objectors argues that Local 486 should be estopped from seeking by means of this application to enforce in respect of the two Basic stores its bargaining rights under the Agreement because, by Baily's conduct, he has waived the rights of Local 486 under the Agreement. First, Baily has effectively agreed to an amendment to the Agreement in standing by and not seeking to enforce its terms while Steinberg transferred employees to other locations and while Yesteryear hired new employees to replace them in the new operations at the two stores. Counsel submits that this amounts to a contraction of the bargaining unit in the agreement and an amendment. That result is reinforced by Baily's undertaking to discuss with Yesteryear recognition for Local 486 and by seeking to obtain the same scope of bargaining rights with Yesteryear as was in the agreement. Counsel argues that Baily's actions constitute a waiver of rights under the Agreement and the consideration with respect to this waiver was by Steinberg and Yesteryear promising to give Local 486 the bargaining rights for Yesteryear's new employees at the two Basic stores. In this respect, counsel referred the Board to topic 1471 of *Hallsburys Laws*, vol. 16 and to the judgement of McKay, J. in *Legatt v. Bank of Montreal and McLean*, [1939] 1 D.L.R. 137 (S.C.O.)

29. Counsel for the objectors argues further that the Courts have applied the doctrine of estoppel by encouragement or acquiescence to protect the rights of third parties and that the Board should apply that principle in the facts of this case in order to protect the new employees hired by Yesteryear. He referred the Board to the discussion of this principle in 11 Handsbury and Maudsley, *Modern Equity*, Stevens and Sons Limited, 1981. The new employees of Yesteryear, he contends, will suffer detriment if Local 486 is allowed to enforce by means of this application a right which it had under the agreement. Therefore the union should be estopped from enforcing that right because some or all of these employees would be prejudiced by the Steinberg employees exercising bumping rights under the seniority provisions of the Agreement. In support of this proposition, counsel relied on the judgement in *Legatt, supra*.

30. In the alternative, if the Board finds that the bargaining rights of Local 486 for Steinberg's employees flows through with the Agreement via either section 1(4) or section 63(2) of the Act, counsel for the objectors submits that the Board should exercise its discretion to prevent Local 486 and its members from applying the seniority provisions of the Agreement and bumping the new Yesteryear employees. In

counsel's view, the Board has discretion under section 1(4) and under subsection 8 of 63 to prevent the exercise of those rights.

31. The Board has considered fully the various arguments of counsel for the respondents and objectors that Local 486 should be estopped from pursuing this application, but the Board is not persuaded by any or all of them that the facts of this case fit within the principles on which those arguments are based. Baily made no promise that Local 486 would not exercise its rights under the Act and specifically no promise that Local 486 would not apply under either section 1(4) or section 63 of the Act to protect its bargaining rights for Steinberg employees. Nor did Baily promise to withdraw the application after it was filed. Steinberg's decision to transfer its employees from the two Ottawa Stores upon closing them under terms more generous than called for by the Agreement was not one in which Baily participated. Nor did he participate in Steinberg's decision that none of its employees would be retained at the two stores or in Yesteryear's decision to hire new employees. It is not surprising that he did not participate in either decision because Duchemin considered the Steinberg employees to have no rights with respect to the Basic stores and Ledenheim made it clear in his testimony that he did not want Steinberg employees for the new operation, rather he insisted on new employees being hired and trained in the new store concept. What Baily has done is to attempt to meet the request of Steinberg and Yesteryear to bargain a more flexible arrangement for the Basic stores in a separate collective agreement. To that end, he has participated in collective bargaining with Yesteryear both before and after the filing of this application. The fact that Baily has chosen, at the invitation of the respondents' representatives, to pursue the negotiating route rather than pressing litigation under the Act, should not prevent him from proceeding with the application which he had made under this Act on February 5th when the negotiations failed to produce a settlement, as they did, particularly absent any promise not to pursue Local 486's rights under the Act. For all of these reasons, the Board considers this application to be properly before it for determination on its merits.

32. Turning first to the question of whether there has been a sale of a business within the meaning of section 63(1) of the Act, the two parts to the question are: has there been a sale within the definition of subsection; and, if so, is the subject of that sale a business or part of a business of the vendor? The facts in this case reveal that there has been an assignment of the leases for the two Basic stores from Steinberg to Yesteryear. This assignment took effect on January 9th, 1982, the day on which the two stores ceased to operate as Steinberg stores. On the same day a transfer of assets was affected from Steinberg to Yesteryear for due consideration. While there was no transfer of employees at the bargaining unit level, three key management staff transferred from Steinberg to Yesteryear without loss of service credits. Yesteryear took immediate possession of the premises and began to renovate them and within a month of the closing of the stores by Steinberg, Yesteryear had re-opened them for business as a retail food outlet offering to the public groceries, meats, produce and dairy products, the same four food groups which had been available to Steinberg customers.

33. The Board consistently considers the substance and not the form of the transaction when it is determining whether there has been a sale of a business within the meaning of section 63 of the Act. See the Board's decision in *Metropolitan Parking*

Inc., [1979] OLRB Rep. Dec. 1193. In that regard, the fact that no employees other than managers transferred from Steinberg to Yesteryear is not significant, particularly in light of Steinberg's failure to offer any opportunity for the employees to remain at the two stores, its insistence that they had no rights with respect to the new operation and Yesteryear's wish to hire new employees instead. See *Gordons Markets*, [1978] OLRB Rep. Dec. 1102 at paragraph 34. Nor is it significant that Yesteryear purchased none of Steinberg's stock in trade. The Board has over many years attached substantial significance however to the occupation by one employer in the retail food industry of premises previously occupied by another employer in that industry relative to other factors considered to be indicia of any sale of a business under the Act. See *Darrigo Consolidated Holdings Inc.*, [1980] OLRB Rep. Jan 29. It has even greater significance when the new occupant and the prior one are corporations within a common corporate organization and the change in occupancy results from a transaction between them, the transfer of leases for the two stores in this case, which hardly can be viewed as an arm's-length one. See *Sunnybrook Food Market (Keele) Limited*, [1974] OLRB Rep. Jan. 47. In our view, considerable goodwill of the Steinberg customers would attach to the premises to the advantage of Yesteryear in these circumstances. While the Basic stores represent a different style of retailing food products, the products available are substantially similar to those which had been sold by Steinberg when it occupied the two stores and Basic would benefit to a significant degree from the shopping habits of the former Steinberg customers. Having regard to the foregoing principles and to the facts herein, the Board finds that the Basic stores constitute a continuation of Steinberg's business in the hands of Yesteryear and, therefore, that there has been a sale of part of Steinberg's business to Yesteryear within the meaning of section 63 of the Act.

34. There was frequent reference to the Basic stores representing a new concept in food merchandising at the retail level, the two stores still offer to the public groceries, produce, meat and dairy products although not with the same variety as Steinberg had. While there is to doubt that the purpose of this concept food merchandising is to make food products available at a lower retail price, it still remains that the continuing focus of the business is the retail sales of food stuffs in those four groupings. To this extent, in the opinion of the Board, the change in concept would not represent a change by Yesteryear in the character of the business so that it is substantially different from the business of Steinberg, the predecessor employer, such that would accommodate an application under subsection 5 of section 63.

35. Counsel for the respondents and the objectors both argued that the Board had the discretion to and should grant relief from the flow through of the Agreement and/or the bargaining rights attached to it should the Board find that there has been a sale of a business under section 63. The objectors' counsel was seeking relief for Yesteryear employees against the possible exercise by Local 486 members of seniority rights under the Agreement to displace any Yesteryear employees. The Act does not give the Board the sort of broad discretion that would be required to grant the relief requested. In this respect, see the Board's decision in *G.A.C. Industries Ltd.*, [1981] OLRB Rep. June 658 in which the Board considered a request to declare that a collective agreement did not flow through and in *John Lester Drugs Ltd.*, [1982] OLRB Rep. June 886 which adopted the reasoning of *G.A.C.*. For similar reasons the Board herein cannot make the declaration sought by counsel.

36. The Board is not without concern for the rights of the employees hired by Yesteryear. If they have a cause of action against Yesteryear or Local 486, however, section 63 of the Act does not give the Board the discretion to accommodate such cause. Therefore, they either would have to look to some other section of the Act, to the Agreement or to civil action.

37. Accordingly, for all of the reasons set out herein, the Board concludes that Yesteryear was bound by the collective agreement between Steinberg Inc., and the Commercial Workers Union, Local 486 at the time of the sale on June 9, 1982 and has continued since that date to be bound by it according to all of its terms, and the Board so declares.

38. In the result, it is unnecessary for the Board to deal with the application as it pertains to section 1(4) of the Act.

DECISION OF BOARD MEMBER J. WILSON;

1. I concur with my colleagues that there has been a sale of part of Steinberg's business to its wholly owned subsidiary Yesteryear. Nonetheless I would like to add some comments about the employees of Yesteryear and their treatment by the parties.

2. It is my feeling that the union and the corporate entities involved have been less than fair to the employees hired for the Basic stores by disregarding their legitimate interests.

3. The union and Yesteryear negotiated for some time to arrive at a separate agreement for the Basic stores. When news of the Dominion Stores agreement came to Mr. Baily's attention in March or April he wanted the same provisions and negotiations broke down.

4. Mr. Baily then moved to litigate his deferred successor rights/related employer application before this Board which, although a legitimate ploy, does raise in my mind, a question of what were his original intentions.

5. In my view this case has done much to harm employer-employee relationships between the parties involved. It is to be hoped that their future actions will be directed towards renewing their prior good relationships.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD NOVEMBER 1982

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0491-82-R: Food and Service Workers of Canada, (Applicant) v. Canadian Pacific Hotels Ltd., carrying on business as Royal Bank Plaza Restaurants and Globe Reality Ltd. carrying on business as Royal Bank Plaza Restaurants, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff and entertainers." (85 employees in unit). (*Clarity Note*).

0870-82-R: United Brotherhood of Carpenters and Joiners of America Local 2486, (Applicant) v. D. J. Venasse Construction Limited and Century Contracting North Bay Company Ltd., (Respondents).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent D. J. Venasse Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent D. J. Venasse Construction Limited within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in unit).

0950-82-R: Labourers' International Union of North America, Local 837, (Applicant) v. Ninco Construction Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in unit).

1109-82-R; 1128-82-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Alltour Marketing Support Services Limited, (Respondent).

Unit: "all employees of the respondent in Mississauga, save and except warehouse foreman, persons above the rank of warehouse foreman, office and sales staff, persons regularly

employed for not more than 24 hours per week, students employed during the school vacation period and persons employed in the Speed Service Division." (45 employees in unit). (*Having regard to the agreement of the parties*).

1162-82-R: United Steelworkers of America, (Applicant) v. Walbar of Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent company at its Aerowood Drive location in the Municipality of Mississauga, save and except foremen, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (342 employees in unit). (*Having regard to the agreement of the parties*).

1230-82-R: Christian Labour Association of Canada, (Applicant) v. Heritage Manor Rest Home, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Blenheim, Ontario, save and except registered nurses, supervisors, persons above the rank of supervisor and office staff." (13 employees in unit). (*Having regard to the agreement of the parties*).

1243-82-R: Ontario Public Service Employees Union, (Applicant) v. Temiskaming Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all paramedical employees of the respondent at New Liskeard, Ontario save and except chief laboratory technologist, chief radiology technologist, Director of Medical Records, Director of Dietetics, Director of Pharmacy, Director of Physiotherapy and persons above such ranks, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (22 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1261-82-R: United Food and Commercial Workers International Union, Local 175, (Applicant) v. Huntsville IGA, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its retail stores in Huntsville, Ontario, save and except store manager, persons above the rank of store manager and meat department employees covered by the certificate issued in Board File No. 1262-82-R." (50 employees in unit).

1262-82-R: United Food and Commercial Workers International Union, Local 633, (Applicant) v. Huntsville IGA, (Respondent) v. Group of Employees, (Objectors).

Unit: "all meat department employees of the respondent in its stores in Huntsville, Ontario, save and except persons regularly employed for not more than twenty-four hours per week." (50 employees in unit).

1270-82-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1151; 1244; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Cortec Industrial Services Inc., (Respondent).

Unit: "all millwrights and millwrights' apprentices in the employ of the respondent in Windsor, save and except foremen and persons above the rank of foreman." (2 employees in unit). (*Having regard to the agreement of the parties*).

1300-82-R: United Food and Commercial Workers International Union Local 175, (Applicant) v. Hayden MacDonald (Oshawa) Limited, (Respondent).

Unit: "all employees of the respondent at Oshawa, save and except foremen, persons above the rank of foreman, office and sales staff, routing and shipping clerk and those employed for not

more than 24 hours per week and students employed during the school vacation period.” (31 employees in unit). (*Having regard to the agreement of the parties*).

1308-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. Ron Robinson Limited, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by a subsisting collective agreement between the applicant and the respondent”. (3 employees in unit).

1320-82-R: London and District Service Workers’ Union, Local 220, SEIU-CIO CLC, (Applicant) v. Strathroy Nursing Homes Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Strathroy, Ontario, who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff.” (13 employees in unit). (*Having regard to the agreement of the parties*).

1321-82-R: London and District Service Workers’ Union, Local 220, SEIU-CIO-CLC, (Applicant) v. Strathroy Nursing Homes Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in Strathroy, Ontario save and except supervisors, persons above the rank of supervisor, registered and graduate nurses persons regularly employed for not more than twenty-four hours per week.” (18 employees in unit). (*Having regard to the agreement of the parties*).

1323-82-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Pre-Fab Limited, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (8 employees in unit). (*Having regard to the agreement of the parties*).

1329-82-R: Canadian Union of Public Employees, (Applicant) v. Regional Municipality of Hamilton-Wentworth (Wentworth Heritage Village), (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, save and except curator, superintendent, persons above such ranks and persons covered by subsisting collective agreements.” (34 employees in unit). (*Having regard to the agreement of the parties*).

1330-82-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. VS Services Ltd., (Respondent).

Unit: “all employees of the respondent employed at its operation at Bell Trinity Square, 483 Bay Street in Metropolitan Toronto, Ontario, save and except chef and supervisor, persons above the rank of chef and supervisor, persons regularly employed for not more than 24 hours

per week and students employed during the school vacation period.” (3 employees in unit). (*Having regard to the agreement of the parties*).

1335-82-R: L'Association des Professeurs d'Universite de Hearst, (Applicant) v. Le College de Hearst, (Respondent).

Unit: “all full time faculty of the respondent in the Municipality of Hearst including professional librarians, lecturers, laboratory technicians and director of the Research Centre save and except the director of Le College de Hearst.” (12 employees in unit). (*Having regard to the agreement of the parties*).

1344-82-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), (Applicant) v. Niagara Premium Sales Limited, (Respondent).

Unit: “all employees of the respondent in St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (20 employees in unit). (*Having regard to the agreement of the parties*).

1350-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. Dranco Group Inc., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

1351-82-R: Service Employees International Union, Local 532, A.F.L., C.I.O., C.L.C., (Applicant) v. St. Elizabeth Home Society (Hamilton, Ontario), (Respondent).

Unit #1: “all employees of the respondent at its nursing home(s) in the City of Hamilton, Ontario, save and except registered and graduate nurses, paramedical personnel, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (41 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent at its nursing home(s) in the City of Hamilton, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered and graduate nurses, paramedical personnel, supervisors, persons above the rank of supervisor and office staff.” (13 employees in unit). (*Having regard to the agreement of the parties*).

1358-82-R: Service Employees Union, Local 210, affiliated with Service Employees International Union, AFL:CIO:CLC:, (Applicant) v. LaPointe-Fisher Nursing Home Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Wallaceburg, save and except professional medical staff, registered and graduate nurses, supervisors, persons above the rank of supervisor, office

staff and paramedical personnel.” (67 employees in unit). (*Having regard to the agreement of the parties*).

1363-82-R: Service Employees Union, Local 204 affiliated with AFL:CIO:CLC:, (Applicant) v. Modern Building Cleaning, a division of Dustbane Enterprises Limited, (Respondent).

Unit: “all employees of the respondent at the Weiz Training Centre and Bakerwood Building in the Municipality of Metropolitan Toronto, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff.” (10 employees in unit). (*Having regard to the agreement of the parties*).

1365-82-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Dominion Dairies Ltd., (Respondent).

Unit: “all dependent contractors of the respondent at Hamilton, Ontario, save and except foremen and persons above the rank of foreman.” (5 employees in unit). (*Having regard to the agreement of the parties*).

1366-82-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Dominion Coal-Building Supplies Ltd., (Respondent).

Unit #1: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.” (29 employees in unit). (*Having regard to the agreement of the parties*).

1379-82-R: International Ladies’ Garment Workers’ Union, (Applicant) v. H.L.S. Dress, (Respondent).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, mechanics, designers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (22 employees in unit). (*Having regard to the agreement of the parties*).

1391-82-R: United Steelworkers of America, (Applicant) v. Walbar of Canada Inc., (Respondent).

Unit: “all employees of the respondent at its Sharlyn Road location in the Municipality of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (147 employees in unit). (*Having regard to the agreement of the parties*).

1394-82-R: United Brotherhood of Carpenters and Joiners of America Local 1669, (Applicant) v. Kornovski & Keller Contractors Ltd., (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

1409-82-R: Service Employees Union, Local 478, (Applicant) v. Canadian Red Cross Society, Ontario Division Burk's Falls Hospital, (Respondent).

Unit: "all employees of the respondent at Burk's Falls, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, paramedical personnel, office and clerical staff, supervisors and persons above the rank of supervisor." (6 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1447-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. Houston Investments Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the work of non-working foreman." (4 employees in unit).

1449-82-R: Ontario Public Service Employees Union, (Applicant) v. Circle "R" Boys Ranch, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Cookstown, Ontario, save and except program co-ordinator, persons above the rank of program-co-ordinator, office and clerical staff and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1461-82-R: United Steelworkers of America, (Applicant) v. Walbar of Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its Watline Street location in the Municipality of Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (21 employees in unit). (*Having regard to the agreement of the parties*).

1466-82-R: Service Employees International Union, Local 183, AFL, CIO, CLC, (Applicant) v. Belleville Foods Wholesale Ltd., (Respondent).

Unit: "all employees of the respondent at Belleville, Ontario, save and except manager, persons above the rank of manager and confidential secretary to the President." (4 employees in unit). (*Having regard to the agreement of the parties*).

1479-82-R: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. J. P. Drywall, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of

Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

1501-82-R: Hotel, Restaurant and Cafeteria Employees Local 75, (Applicant) v. Ken Car Holdings Ltd. carrying on business as Pizza Delight, (Respondent).

Unit #1: "all employees of the respondent in the City of St. Catharines, Ontario, save and except Managers, persons above the rank of Manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (12 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period in the City of St. Catharines, Ontario, save and except Managers and persons above the rank of Manager." (17 employees in unit). (*Having regard to the agreement of the parties*).

1506-82-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Gay Lea Foods Co-operative Limited, (Respondent).

Unit: "all employees of the respondent at 40 Fenmar Drive in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and laboratory staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (19 employees in unit). (*Having regard to the agreement of the parties*).

1550-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. Ron Robinson Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0452-82-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the City of Ottawa, (Respondent).

Unit: "all employees of the respondent in the City of Ottawa regularly employed for not more than twenty-four hours per week, save and except students employed during the school vacation period." (161 employees in unit).

Number of names of persons on revised voters' list		104
Number of persons who cast ballots	51	
Number of ballots marked in favour of applicant		34
Number of ballots marked against applicant		7
Ballots segregated and not counted		10

Bargaining Agents Certified Subsequent to a Post Hearing Vote

2480-81-R: United Brotherhood of Carpenters and Joiners of America, The Corporation of the City of Brockville, (Respondent) v. Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent employed as Arena Attendants regularly employed for more than twenty-four (24) hours per week, and all its employees employed in Arena Canteens, save and except foremen and supervisors and persons above the rank of foreman or supervisor and persons covered by any subsisting collective agreements between the employer and the Canadian Union of Public Employees, Local 115." (20 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		18
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		5
Ballots segregated and not counted		2

Applications for Certification Dismissed – No Vote Conducted

2221-81-R: International Beverage Dispensers' and Bartenders Union Local 280 of the Hotel and Restaurant Employees International Union A.F.L. C.I.O. C.L.C., (Applicant) v. Movel Restaurantes Limited c.o.b. as Movenpick Restaurants of Switzerland, (Respondent) v. Group of Employees, (Objectors). (75 employees in unit).

0794-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 275, (Respondent). (2 employees in unit).

0844-82-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. The Queen Elizabeth Hospital, (Respondent) v. The Canadian Union of Public Employees, (Intervener). (10 employees in unit).

0983-82-R: Angela Lopardo, (Applicant) v. The International Ladies' Garment Workers' Union, (Respondent) v. The Sigal Shirt Company Limited, (Intervener). (94 employees in unit).

1062-82-R: Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Applicant) v. Cara Operations Limited, Urban Restaurant Division, (Respondent). (18 employees in unit).

1206-82-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. H. E. Vannatter Limited, (Respondent) v. Group of Employees, (Objectors). (164 employees in unit).

1322-82-R: Service Employees Union, Local 663, AFL, CIO, CLC, (Applicant) v. Belleville General Hospital, (Respondent). (51 employees in unit).

1324-82-R: Hotels, Clubs, Restaurants, & Tavern Employees' Union, Local 261, (Applicant) v. Winco Steak N' Burger, (Respondent). (10 employees in unit).

1342-82-R: Windsor Grain Processor's Union, (Applicant) v. Maple Leaf Monarch Company, (Respondent). (86 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0918-82-R: Energy and Chemical Workers Union CLC, (Applicant) v. Indusmin Limited, (Respondent) v. United Cement Lime Gypsum and Allied Workers International Union AFL, CIO, CLC, (Intervener).

Unit: "all employees of Indusmin Limited at its mine and plant at Nephton, Ontario save and except officers of the company; management personnel. supervisors, foremen, hourly rated employees above the rank of working sub-foreman; secretary to mine manager, draftsmen, surveyors; janitors and watchmen, and employees who have less than thirty (30) days of service or two hundred and forty (240) hours worked, whichever comes first, with the company." (106 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		111
Number of persons who cast ballots	103	
Number of ballots marked in favour of applicant		49
Number of ballots marked in favour of intervener		54

1175-82-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 326, (Applicant) v. Hostess Food Products Limited, (Respondent).

Unit: "all employees of the respondent at Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (385 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		384
Number of persons who cast ballots	372	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		107
Number of ballots marked against applicant		263

1215-82-R: Energy and Chemical Workers Union, (Applicant) v. Brown Fintube Engineering Limited, (Respondent) v. Heat Transfer Workers Union, (Intervener).

Unit: "all employees of the respondent at St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, security guards, office and sales staff, persons regularly employed for not more than twenty-five (25) hours per week." (42 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		38
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant		15
Number of ballots marked in favour of intervener		20

1280-82-R: International Ladies' Garment Workers' Union, (Applicant) v. Petite Originals Co. Ltd., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, designers, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (99 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on list as originally prepared by employer		98
Number of persons who cast ballots	86	

Number of spoiled ballots	2
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	44
Ballots segregated and not counted	1

Applications for Certification Dismissed Subsequent to a Post Hearing Vote

0053-82-R: International Brotherhood of Electrical Workers Local Union 1687, (Applicant) v. Crowle Electrical Limited c.o.b. as Crown Electric, (Respondent) v. Christian Labour Association of Canada, (Intervener) v. Christian Labour Association of Canada, (Intervener) v. Group of Employees, (Objectors).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (22 employees in unit).

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	12
Ballots segregated and not counted	1

0977-82-R: Labourers' International Union of North America, Local 527, (Applicant) v. Curbanectics Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in unit).

Number of names of persons on list as originally prepared by employer	25
Number of persons who cast ballots	22
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	13

1024-82-R: St. Catharines Typographical Union Local 416 of the International Typographical Union, (Applicant) v. Hag Distributors, (Respondent).

Unit: "all employees of the respondent at St. Catharines, save and except supervisors and persons above the rank of supervisor." (18 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer	19
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	13

1080-82-R: Christian Labour Association of Canada, (Applicant) v. Daynes Holdings Ltd., c.o.b. Frost Manor (Extended Health Care Unit), (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Lindsay, Ontario, save and except Registered and Graduate Nurses, persons above the rank of Registered Nurse, office and clerical staff, and persons regularly employed for not more than twenty-four (24) hours per week.” (17 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		12

1218-82-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Northbury Hotels Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent in Sudbury, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (47 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters’ list		25
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		17

Unit #2: “all employees of the respondent in Sudbury regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff.” (19 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters’ list		40
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		24

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0821-82-R: Labourers’ International Union of North America, Local 607, (Applicant) v. Newman Brothers Ltd., (Respondent) v. The Lumber and Sawmill Workers’ Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

1129-82-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Tornat Construction Limited, 422 Dunlop Street, Dunbar Industrial Parks, (Respondents).

1263-82-R: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Gencon Construction Ltd., (Respondent).

1294-82-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths Forgers & Helpers, Lodge #637, (Applicant) v. Allen Truck Limited, (Respondent).

1343-82-R: Sheet Metal Workers’ International Association Local 537, (Applicant) v. Warren Sheet Metal & Roofing A Division of Warren Steeplejacks Ltd., (Respondent).

1349-82-R: Local #1 Ontario of the International Union of Bricklayers & Allied Craftsmen, (Applicant) v. M & C Masonry (Serafino Mula), Hamilton, (Respondent).

1367-82-R: London and District Service Workers Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. St. Mary's General Hospital, Kitchener, Ontario (Office & Clerical Part Time), (Respondent).

1378-82-R: United Brotherhood of Carpenters & Joiners of America Local 494, (Applicant) v. Briar Hill Homes (Windsor) Inc., (Respondent).

1380-82-R: Sterling Employees Association, (Applicant) v. Sterling Marking Products Inc., (Respondent).

1399-82-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Millwork and Building Supplies Company Limited, (Respondent).

1444-82-R: The International Association of Machinists and Aerospace Workers, (Applicant) v. St. Clair International Truck Ltd., (Respondent).

1570-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. Lunar Frame & Woodworking Co. Ltd., (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1419-82-R: Service Employees of International Union, Local 183, AFL, CIO, CLC., (Applicant) v. Extendicare Ltd. and Extendicare Ltd./Peterborough Retirement Home, (Respondent). (*Withdrawn*).

SALE OF A BUSINESS

0502-82-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) Local 641, (Applicant) v. Ottawa Truck Centre, a division of Kemptville Truck Centre Limited, (Respondent). (*Dismissed*)

1226-82-R: Shopmen Local Union No. 834 of the International Association of Bridge, Strucutral and Ornamental Ironworkers, (Applicant) v. Welded Grating Limited, Whitby Welding Limited and Whitby Mechanical Installations Ltd., (Respondents). (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2615-81-R: John D. Weed; (Applicant) v. Local #419 Teamsters, (Respondent) v. Browning-Ferris Industries, (Intervener).

Unit: "all employees of the respondent at its facility located at 35 Vanley Crescent, Downsview, Ontario, M3J 2B7, working in the job classifications listed in the collective agreement, save and except supervisors, those above the rank of supervisors, clerical and sales employees, watchmen and guards, part-time employees who work less than twenty-four (24) hours in a week." (*Dismissed*)

Number of names of persons on list as originally prepared by employer	37
Number of persons who cast ballots	37
Number of ballots marked in favour of respondent	23
Number of ballots marked against respondent	14

0916-82-R: Sally Demontigny, (Applicant) v. Local Union 2345 of the International Brotherhood of Electrical Workers, (Respondent) v. Johnston-Soper Division, Designed Power Limited, (Intervener).

Unit: "all employees of Johnston-Soper Division, Designed Power Limited in the City of Waterloo, Ontario, save and except foremen, persons above the rank of foreman, office and technical staff, students employed during the school vacation period, students involved in co-operative training programs with high school, community college, university or similar institutions, and persons regularly employed for not more than twenty-four hours per week." (*Granted*)

Number of names of persons on list as originally prepared by employer		65
Number of persons who cast ballots	64	
Number of ballots marked in favour of respondent		17
Number of ballots marked against respondent		47

1047-82-R: Norman Marsden, (Applicant) v. International Association of Machinists & Aerospace Workers, District Lodge 717, (Respondent) v. Byers-Bush (1977) Ltd., (Intervener).

Unit: "all employees of Byers-Bush (1977) Limited at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (*Granted*)

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		8

1090-82-R: Ian Dart and others, (Applicant) v. International Association of Machinists and Aerospace Workers, District Lodge 717, (Respondent).

Unit: "all employees of Masoneilan of Canada Ltd., in the Town of Oakville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (*Granted*)

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	13	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		13

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

1293-82-M: Paramount Tavern, (Employer) v. International Beverage Dispensers' and Bartenders' Union, Local 280, (Trade Union) v. The Hotel Association of Metropolitan Toronto, (Intervener). (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1790-79-U; 2040-80-U: United Steelworkers of America, (Complainant) v. Fotomat Canada Limited, (Respondent). (*Granted*)

0651-81-U: Ottavio Stumpo, (Complainant) v. Teamsters Local Union 419, Warehousemen & Miscellaneous Drivers, (Respondent). (*Withdrawn*)

1176-81-U; 1446-81-U: Amadeu Prim, (Complainant) v. Labourers' International Union of North America, Local 527, (Respondent). (*Withdrawn*)

2220-81-U: The International Beverage Dispensers' Union, Local 280, (Applicant) v. Movel Restaurants Limited c.o.b. as Movenpick Restaurants of Switzerland, (Respondent). (*Withdrawn*)

2582-81-U: Beckett Elevator Company Limited, (Complainant) v. National Elevator and Escalator Association, (Respondent) v. International Union of Elevator Constructors, Local 50, (Intervener). (*Withdrawn*)

0196-82-U: Donald Fex, (Complainant) v. Painters and Allied Trades Local 205, (Respondent) v. Dayson Sandblasting & Coatings, (Intervener). (*Withdrawn*)

0197-82-U: Roy Hicks, (Complainant) v. Painters and Allied Trades Local 205, (Respondent) v. Dayson Sandblasting & Coatings, (Intervener). (*Withdrawn*)

0198-82-U: Brian Hesse, (Complainant) v. Painters and Allied Trades Local 205, (Respondent) v. Dayson Sandblasting & Coatings, (Intervener). (*Withdrawn*)

0418-82-U: International Brotherhood of Electrical Workers Local Union 1687, (Complainant) v. Crowle Electrical Limited c.o.b. as Crown Electric, (Respondent) v. Christian Labour Association of Canada, (Intervener). (*Granted*)

0598-82-U: Pasqualina Botticell, (Complainant) v. Stanely Door Systems Ltd., (Respondent). (*Withdrawn*)

0638-82-U: Canadian Union of Public Employees, (Complainant) v. Country Place Nursing Home, (Respondent). (*Withdrawn*)

0797-82-U: Draftsmen's Association of Ontario, Local 164, (Complainant) v. Massey-Ferguson Industries Limited, (Respondent). (*Withdrawn*)

0807-82-U: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 628 and the Ontario Pipe Trades Council, (Complainant) v. Clow-Darling Mechanical Limited, (Respondent). (*Withdrawn*)

0825-82-U: Jesse L. Gillespie, (Complainant) v. United Automobile, Aerospace & Agricultural Implement Workers of America Local 439 (UAW), Cliff Pilkey and the Executive of International UAW, (Respondents) v. Massey/Ferguson Industries Limited, (Intervener). (*Dismissed*)

0860-82-U: Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Newman Bros. Limited and Labourers' International Union of North America, Local 607, (Respondents). (*Withdrawn*)

0984-82-U: Ontario Taxi Association, Local 1688, C.L.C., (Complainant) v. Maple Leaf Taxi Company Ltd., (Respondent). (*Granted*)

1023-82-U: Nasim Bhatti, (Complainant) v. Kraus Carpet Employees Union, (Respondent) v. Kraus Carpet Mills Limited, (Intervener). (*Dismissed*)

1030-82-U: Local 486, Commercial Workers Union, (Complainant) v. Santa Maria Foods Ltd., and Christopher Chop, (Respondent). (*Withdrawn*)

1036-82-U: United Brotherhood of Carpenters and Joiners of America, Local 93 and John Holland, (Complainant) v. DI-AL Construction Limited, (Respondent). (*Granted*)

1040-82-U: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Complainant) v. D. J. Venasse Construction Limited and Century Contracting Company, (Respondent). (*Withdrawn*)

1104-82-U: Linda Jean Boone, (Complainant) v. Service Employees Union Local 210, (Respondent). (*Withdrawn*)

1176-82-U: Charles Gauthier, (Complainant) v. Wegu Canada Inc., (Respondent). (*Withdrawn*)

1194-82-U: Charles Gauthier, (Complainant) v. United Rubber, Cork, Linoleum and Plastic Workers of America, AFL:CIO:CLC Local, (Respondent). (*Withdrawn*)

1213-82-U: Commercial Workers Union, Local 486, Chartered by the United Food and Commercial Workers Union, (Complainant) v. Santa Maria Foods Limited and Gary C. Walker and Henry Hilverda, (Respondent). (*Withdrawn*)

1250-82-U: Ontario Nurses' Association, (Complainant) v. Brouillette Manor Limited, (Respondent). (*Withdrawn*)

1253-82-U: United Food and Commercial Workers International Union, Local 175, (Complainant) v. Hayden MacDonald (Oshawa) Limited, (Respondent). (*Withdrawn*)

1254-82-U: Christian Labour Association of Canada, (Complainant) v. Vision Rest Home, (Respondent). (*Dismissed*)

1284-82-U: Retail Clerks Union, Local 409, (Complainant) v. Northwest Merchants Limited Canada, (Respondent). (*Withdrawn*)

1292-82-U: Millworkers Local 802, United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Industrial Fabricators (Division of 395660 Ontario Limited), (Respondent). (*Withdrawn*)

1318-82-U: Ontario Nurses' Association, (Complainant) v. Heritage Nursing Home Limited, (Respondent). (*Withdrawn*)

1332-82-U: International Beverage Dispensers' and Bartenders' Union, (Complainant) v. Chez Mois Tavern Limited, (Respondent). (*Withdrawn*)

1337-82-U: International Beverage Dispensers' and Bartenders' Union, Local 280, (Complainant) v. The Boulevard Inn carrying on business as The Lighthouse Inn, (Respondent). (*Withdrawn*)

1341-82-U: Christian Labour Association of Canada, (Complainant) v. Ark Eden Nursing Home, (Respondent). (*Withdrawn*)

1348-82-U: Angela, M. Gervasi, (Complainant) v. Consolidated Fibres of Ontario Ltd., (Respondent). (*Withdrawn*)

1353-82-U; 1354-82-U; 1355-82-U; 1356-82-U; 1357-82-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC: (Complainant) v. Stedmans, Division of Macleod Stedman Inc., (Respondent). (*Withdrawn*)

1374-82-U: Dorothy Rumble, (Complainant) v. Local 1324 & Can Fab., (Respondent). (*Withdrawn*)

1382-82-U: Joseph Gulli, (Complainant) v. Blue Bird Bakery Ltd., (Respondent). (*Withdrawn*)

1385-82-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Horseshoe Inn Motel Operated by Diamond Motel London Ltd., (Respondent). (*Withdrawn*)

1387-82-U: Harriet Van Luien, (Complainant) v. Energy and Chemical Workers Union, Local 620, (Respondent). (*Withdrawn*)

1388-82-U: Winston Rodgers, (Complainant) v. Canadian PAPER Workers Union Local 302, (Respondent). (*Withdrawn*)

1389-82-U: Rene Verpaelt, (Complainant) v. UAW Local 444, (Respondent). (*Withdrawn*)

1402-82-U: Office and Professional Employees International Union, (Complainant) v. Silverwood Dairies, Division of Silverwood Industries Limited, (Respondent). (*Withdrawn*)

1413-82-U: Christian Labour Association of Canada, (Complainant) v. Daynes Holdings Ltd., c.o.b. Frost Manor (Extended Health Care Unit), (Respondent). (*Withdrawn*)

1414-82-U: Neville McKenzie, (Complainant) v. Westinghouse Canada, Beach Rd., and the Union, United Electrical Radio & Machine Workers of America, Local 504, (Respondent). (*Withdrawn*)

1415-82-U: Jack Renton, (Complainant) v. Teamsters Local Union 419, (Respondent). (*Withdrawn*)

1422-82-U: Manuel Dinis Ferreira, (Complainant) v. Laborer's International Union of North America, Local 527, (Respondent). (*Withdrawn*)

1431-82-U: Lee Bowen, (Complainant) v. Weldwood of Canada and International Woodworkers of America, (Respondents). (*Withdrawn*)

1451-82-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Eve Foodwear Inc., (Respondent). (*Withdrawn*)

1452-82-U: Canadian Union of Operating Engineers and General Workers, (Complainant) v. M & O Buslines (Handicab) Ltd., (Respondent). (*Withdrawn*)

1462-82-U: Angela Maria Gervasi, (Complainant) v. Consolidated Fibres of Ontario Ltd. and L.I.U.N.A. Local 1267, (Respondent). (*Withdrawn*)

1465-82-U: Agnes Younge and Thelma Dailey, (Complainant) v. Employees Association of Thomson Canada River, (Respondent). (*Withdrawn*)

1470-82-U; 1471-82-U; 1472-82-U; 1473-82-U; 1474-82-U; 1475-82-U; 1476-82-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (formerly known as the Laundry, Dry Cleaning and Dye House Workers International Union, Local 351), (Complainant) v. Chesters Drive-In Cleaners, (Respondent). (*Withdrawn*)

1498-82-U: Alice Deighan, (Complainant) v. I.A.M. A.W. L.L. 2330, (Respondent). (*Withdrawn*)

1499-82-U: United Steelworkers of America, (Complainant) v. Modular Windows of Canada Limited, (Respondent). (*Withdrawn*)

1507-82-U: Rosemarie Ramsey, (Complainant) v. Les Crzesiowski Local Chairman of Local 283, (Respondent). (*Withdrawn*)

1511-82-U: Canadian Union of Operating Engineers and General workers, (Complainant) v. Riverside Hospital, (Respondent). (*Withdrawn*)

1552-82-U: Canadian Union of Operating Engineers and General Workers, (Complainant) v. Louis Finkelstein, Member of Ottawa owners and Brokers Association, (Respondent). (*Withdrawn*)

1558-82-U: Canadian Paperworkers Union, (Complainant) v. Waferboard Corporation Limited, (Respondent). (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

2464-81-M: Delmar McCormack Smyth, (Applicant) v. The York University Faculty Association, (Respondent Trade Union), The Board of Governors of York University, (Respondent Employer). (*Dismissed*)

JURISDICTIONAL DISPUTES

0135-82-JD: Ironworkers District Council of Ontario and International Association of Bridge, Structural, and Ornamental Ironworkers Local Union 736, (Complainant) v. Port Colborne Iron Works Ltd. & United Steelworkers of America, Local 4763, (Respondents). (*Withdrawn*)

0931-82-JD: The International Association of Machinists and Aerospace Workers, (Complainant) v. Ontario Hydro and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; (Respondents). (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2357-81-M: Town of Vaughan, (Applicant) v. C.U.P.E. Local 1090, (Respondent). (*Dismissed*)

0740-82-M: Canadian Union of Public Employees, (Applicant) v. Clifton House for Boys, (Respondent). (*Granted*)

0917-82-M: Service Employees Union Local 204, (Applicant) v. Royal Ontario Museum, (Respondent). (*Withdrawn*)

1052-82-M: Health, Office and Professional Employees, Division of Retail, Commercial and Industrial Local Union 206, Chartered by the United Food & Commercial Workers International Union, (Applicant) v. Hyde Park Nursing Home, (Respondent). (*Withdrawn*)

1143-82-M: The Local Board of Health of the Borough of York, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1352-82-OH: Raymond Ayotte, (Complainant) v. Corporation of the City of Ottawa, (Respondent). (*Withdrawn*)

1375-82-OH: Len Belford, (Complainant) v. Corporation of the City of Ottawa, (Respondent). (*Withdrawn*)

1376-82-OH: Brian Demers, (Complainant) v. Corporation of the City of Ottawa, (Respondent). (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2245-81-M: Ontario Sheet Metal Workers' Conference, (Applicant) v. Culliton Brothers Limited, (Respondent) v. Ontario Sheet Metal and Air Handling Group, (Intervener). (*Granted*)

0710-82-M: The Master Insulators' Association of Ontario Inc. and Misco Insulation Company Limited, (Applicant) v. international Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Respondent). (*Granted*)

0755-82-M: United Brotherhood of Carpenters & Joiners of America, Local 38, (Applicant) v. Acme Building and Construction Limited, (Respondent). (*Dismissed*)

0777-82-M: Labourers International Union of North America, Local 607, (Applicant) v. Tamarron Group Inc., (Respondent). (*Granted*)

0832-82-M: Local Union 2486, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. G.S. Wark Ltd., (Respondent). (*Withdrawn*)

0860-82-M: Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Newman Bros. Limited and Labourers' International Union of North America, Local 607, (Respondents). (*Withdrawn*)

0861-82-M: Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Newman Bros. Limited, (Respondent). (*Withdrawn*)

1088-82-M: Labourers' International Union of North America Local 183, (Applicant) v. C.D.C. Contracting, a division of Patron Contracting Limited, (Respondent). (*Granted*)

1235-82-M: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Perfect Acoustic and Drywall Co. Ltd., (Respondent). (*Withdrawn*)

1276-82-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Standard Insulation Limited, (Respondent). (*Withdrawn*)

1311-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Candesco (1978) Ltd., (Respondent). (*Granted*)

1312-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Craighurst Construction Ltd., (Respondent). (*Withdrawn*)

1312-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Craighurst Construction Ltd., (Respondent). (*Withdrawn*)

1325-82-M: Carpenter Local 249 Kingston, Ontario, (Applicant) v. R. L. Wilson Eng. and Const. Ltd., (Respondent). (*Granted*)

1340-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Van Bots Construction Ltd., (Respondent). (*Withdrawn*)

1368-82-M: International Brotherhood of Painters and Allied Trades, Local 1494, (Applicant) v. New Vision Construction Co. Ltd., (Respondent). (*Withdrawn*)

1370-82-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Laamanen Construction Limited, (Respondent). (*Withdrawn*)

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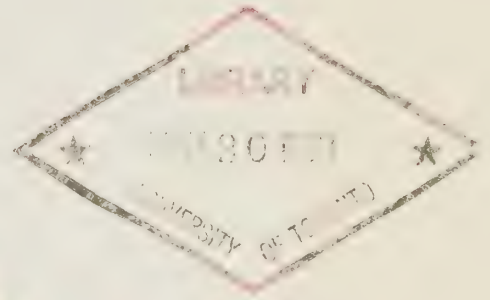
*Ontario Labour Relations Board,
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ISSN 0383-4778

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Related Employer – Reconsideration – Union holding separate bargaining rights for outside workers of City and employees of corporation wholly owned by City – Union's request to consolidate bargaining of two units refused by employers – Whether related employer declaration appropriate to achieve consolidation – Whether authority to consolidate bargaining units implied in Board's power to reconsider

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400 University Avenue,
Toronto, Ontario*

ISSN 0383-4778

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